SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

C 119-66

UNITED STATES OF AMERICA

against

GEORGE WESLEY BENNETT, Defendant,

and

VERNA MAE BIHN, Defendant-Appellant

STATEMENT UNDER RULE 13

The defendant-appellant above named, Verna Mae Bihn, was indicted together with defendant, George Wesley Bennett, for conspiracy to violate Title 50, Appendix, Section 633, United States Code, in that they would unlawfully acquire, possess and transfer gasoline ration coupons, said defendants not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired. The indictment was filed in the United States District Court for the Southern District of New York, on December 8, 1944. The defendant-appellant pleaded "Not Guilty" on December 11, 1944.

On January 30, 1945, the trial was begun as to both defendants before Hon. Grover M. Moscowitz, United States District Judge. On February 1, 1945, the said trial was concluded and the jury returned a verdict of "Guilty" as to both defendants. Motion to set aside the verdict was made at the time of rendition, said motion was denied and sentence was adjourned to February 9, 1945. On said date the said defendant-appellant, Verna Mae Bihn, was sentenced to one year and one day at a place of confinement to be designated by the Attorney General of the United [fol. 2] States with recommendation that she be sent to Federal Women's Reformatory, Alderson, West Virginia.

On February 13, 1945, said defendant-appellant filed a notice and grounds of appeal.

On February 19, 1945, upon motion granted the said defendant-appellant was released on bail pending the determination of her appeal.

On the trial and on this appeal the said defendant-appellant, Verna Mae Bihn, is represented by Henry K. Chapman, Esq.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

vs.

VERNA MAE BIHN

and

GEORGE WESLEY BENNETT

Violation of Title 18, Section 88 U. S. C. Conspiracy to unlawful possession and transfer of gasoline ration coupons.

DOCKET ENTRIES

1944

Dec. 8—Filed Indictment.

Dec. 11—George Wesley Bennett Pleads Not Guilty }

Dec. 11—Verna Mae Bihn Pleads Not Guilty } Released on their own recognizance on this Indictment—Conger J.

Dec.19—Filed Remand—Geo. W. Bennett date 12/11/44—Conger J.

Dec. 19—Filed Remand—Geo. W. Bennett date 12/11/44—Conger J.

[fol. 3] 1945

Jan. 15—Bench Warrant Ordered for Verna Mae Bihn—Clancy J.

Jan. 16—Bench Warrant for Verna Mae Bihn ordered vacated—Clancy J.

Jan. 30—Trial begun as to both defendants before—Moscowitz J.

Jan. 31—Trial continued.

Feb. 1—Trial concluded. Verdict—Defendants guilty—Sentences adjourned to Feb. 9, 1945, at 10:30 A. M. Defendant Bihn paroled on own recognizance on this indictment. Bail of $2000. continued on indictment C 118/361. Deft. Bennett remand—Moscowitz J.

Feb. 5—Filed copy of telegram dated 2/2/45. Re: Bail bond of deft. Bihn.

Feb. 9—Filed Judgment—Verna Mae Bihn—One Year and One Day at a place of confinement to be designated by the Attorney General of the United States. Recommend defendant be sent to Federal Reformatory for women, Alderson, West Va. Deft. to surrender 2/16/45. Released on her own recognizance—Moscowitz J.

Feb. 9—Filed Judgment—George Wesley Bennett—Six months to begin after service of sentence on Indictment C119/14 at a place of confinement to be designated by the Attorney General of the United States—Moscowitz J.

Feb. 9—Issued commitment in triplicate as to both.

Feb. 13—Filed Notice of Appeal by Verna Mae Bihn (notice to Moscowitz) (N. D. C.) 5 00

[fol. 4] Feb. 19—Filed affidavit requesting bail for Verna Mae Bihn pending appeal. Memo endorsed—Bail fixed at $1000. pending appeal.

Feb. 28—Filed Commitment & entered return Defendant Geo. W. Bennett delivered to the Fed. Corr. Inst. Danbury, Conn. 2/24/25. Filed Bond pending Appeal—dated 2/19/45. Verna M. Bihn $1000. Ralph P. Bihn of Casa, Arkansas, surety.

Mar. 16—Filed stipulation extending time to file Transcript of Record & Assignment of errors to & including 4/15/45. So ordered—Coxe, J. 5

Apr. 24—Filed stipulation extending time of Verna Mae Bihn to file bill of exceptions etc. to & including 5/1/45—So ordered A. M. Bell, Clerk C. C. A. 4/16/45.

In United States District Court

Indictment

Southern District of New York, ss:

The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that District, upon their oath present:

That heretofore, to wit, from on or about the 1st day of July, 1943, and continuously thereafter up to and including the 6th day of September, 1944, at the Southern District

of New York and within the jurisdiction of this Court. [fol. 5] Verna Mae Bihn and George Wesley Bennett, the defendants herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with divers other persons to the Grand Jurors unknown to violate Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto.

It was part of said conspiracy that the defendants herein would unlawfully acquire, possess and transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, said defendants not being the persons or agents of the persons to whom said gasoline coupons were issued or by whom they were acquired, in accordance with regulations issued by the Price Administrator.

It was further a part of said conspiracy that the aforesaid defendant, Verna Mae Bihn, would steal, purloin and embezzle gasoline ration coupons, the exact number and type being to the Grand Juors unknown, from the First National Bank of Poughkeepsie, New York.

It was further a part of said conspiracy that the aforesaid defendant, Verna Mae Bihn, would transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to the defendant George Wesley Bennett and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendant, George Wesley Bennett, would give, transfer and sell gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to one Joel Lewis and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendants, Verna Mae Bihn and George Wesley Bennett, would share the moneys obtained from the sale of the aforesaid stolen ration coupons, the exact number and type being to the Grand Jurors unknown.

[fol. 6] Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 9th day of April, 1944, the defendants Verna Mae Bihn and George Wesley Bennett had a conversation.

2. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of October, 1943, the defendant George Wesley Bennett had a conversation with Joel Lewis.

3. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of November, 1943, the defendant George Wesley Bennett had a conversation with Joel Lewis.

4. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of January, 1944, the defendant George Wesley Bennett had a conversation with the defendant Verna Mae Bihn.

5. In further pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about and some time during the month of May, 1944, the defendant George Wesley Bennett had a conversation with Janna Howe.

[fol. 7] Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 88, United States Code).

John F. X. McGohey, United States Attorney.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF AGREED FACTS

It is hereby stipulated and agreed by and between the appellant, and the United States Attorney for the Southern District of New York that the following constitutes a narrative statement of facts in the case of *United States v. Verna Mae Bihn and George Wesley Bennett*. The

parties to this stipulation agree that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal.

Statement of Facts

Appellant Verna Mae Bihn, the defendant George Wesley Bennett, and the husband of Mrs. Bihn, lived in the same three room apartment in Poughkeepsie from some [fol. 8] time in August, 1943, until February, 1944, at which time Bennett left the Bihn household to get married (Ex. 9). Mrs. Bihn was employed during this period of time at the First National Bank of Poughkeepsie. Her duties there during the greater part of her employment which extended from late summer of 1943 until the first part of September 1944, were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government (79).

During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn (Exs. 9, 47, 41). Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as "bingo" sheets): Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between 500 and 600 gallons. When these coupons were affixed to "bingo" sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed "bingo" sheets on which they had been affixed (Ex. 9).

When Bennett moved to his new home in February, there were resident in this new home, in addition to his wife, the witnesses Sussana Howe and Janna Howe, respectively,

the mother-in-law and sister-in-law of the defendant Bennett (3, 61).

[fol. 9] One Sunday in May of 1944, Mrs. Bihn approached the home of the Bennetts and remained outside (5). Mrs. Howe asked her to leave. There ensued an altercation during which the co-defendant Bennett, Mrs. Howe, Janna Howe and Mrs. Bennett were present. Mrs. Howe told Mrs. Bihn that "if she didn't leave us alone, I would be forced to notify the F. B. I. that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." Mrs. Bihn replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too" (6, 63, Ex. 9).

Mrs. Howe knew about the coupons which Mrs. Bihn had stolen because she and both her daughters (Mrs. Bennett and Janna Howe) had seen her son-in-law Bennett have in his possession in her house hundreds and perhaps thousands of coupons of all sorts (162, 8, 3, 4, 52, 53). Both she and her daughters had asked Bennett how he came to have these coupons, and Bennett replied that Mrs. Bihn gave them to him (58 ——).

Shortly after the quarrel on Mother's Day, Mrs. Bihn wrote a letter to the co-defendant Bennett, and enclosed a carbon copy of that letter in a separate envelope, addressed to Mrs. Howe (5, Ex. 1). Amongst other statements in that letter was a reference to the quarrel which took place on Mother's Day, and the following is contained in that letter: "I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me" (Ex. 1).

Bennett stated to several of the Government witnesses that all the coupons he received he got from Mrs. Bihn (36). On another occasion he said that all the coupons he got were from a girl "he was fooling around with that worked in the bank". The girl had been previously iden-

[fol. 10] tified by the witness to whom the statement was made as Mrs. Bihn (43).

Part of Mrs. Bihn's duties at the bank with respect to rationing was to collect all rationing coupons which had been deposited with the bank and place them in a box for shipment to the Office of Price Administration. It was also Mrs. Bihn's duty to keep books showing the amount of

ration currency deposited in the bank (85). It was also Mrs. Bihn's duty to keep other bank records in respect to rationing (87-88, 86). These records were all kept accurately (95, 105). It was Mrs. Bihn's duty to check the ration deposits after she had received them from the bank tellers (93, 98), and it was also her duty to keep the custody and control of the ration currency after it had been deposited. Mrs. Bihn did not receive the ration evidence from the clients of the bank, this was done by the bank tellers (91) but she would later check the deposits against the deposit slips. Frequently the slips were for more than the deposits actually made (92). The gasoline ration coupons were kept in a steel letter file which was locked (98, 125). The keys to this file were kept in Mrs. Bihn's desk drawer which had no lock (99, 126). Mr. Travis, the bank cashier, had a key to the steel file. Three other persons, the note teller, assistant note teller and a stenographer had access to and the occasion to go to said steel file (99, 127) and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves (127). Others may have gone to the steel file and taken ration tokens (99), according to Mr. Travis, and Mrs. Bihn testified that if the ration bookkeeper was not present to furnish information or ration tokens, another employee would take care of the client (127). Mrs. Bihn signed and prepared a document which represented that 156,795.5 gallons of gasoline had been delivered to the Office of Price Administration (Ex. 8, 89, 87). It was also Mrs. Bihn's duty when she had sealed the box preparatory to shipping to the [fol. 11] O. P. A. to prepare another document on which was noted the total contents of the box with respect to each type of ration currency included therein (83-85). This document was then presented to the cashier of the bank, the witness Travis, for his signature. When the shipment was due in the forepart of September, Travis watched Mrs. Bihn prepare the box for shipment. Mrs. Bihn sealed the box and presented to Travis the document she was required to make out. This document represented on its face that there were 156,795.5 gallons of gasoline ration currency in the box (Ex. 6). Travis took the box, after having watched Mrs. Bihn prepare it, and kept it at his desk until the bank's auditor arrived that night (83). The bank's auditor examined the box and found that there were only

119,772 gallons of ration currency in the box and that there were 37,023.5 gallons missing (115).

Subsequent to the time of indictment, and prior to trial of the case, the witness Janna Howe, the 17 year old sister-in-law of the co-defendant Bennett, received several 'phone calls at school from Mrs. Bihn who at one time said to her "* * * I better be careful and she would be waiting for me when I got out" (66).

In United States District Court

Charge of the Court

(Moscowitz, J.)

The Court: Members of the jury, the defendants Verna Mae Bihn and George Wesley Bennett were indicted by the Grand Jury on a charge of conspiracy to violate the law. The indictment charges that from on or about July 1, 1943 and continuously thereafter up to and including September 6, 1944 in the Southern District of New York, that is this District, the defendants did lawfully, wilfully [fol. 12] and knowingly combine, conspire, confederate and agree together and with each other and with divers other persons to the Grand Jurors unknown to violate Title 50, Appendix, Section 633, United States Code, and the rules, regulations and orders duly adopted and issued pursuant thereto; that it was part of the conspiracy that the defendants would unlawfully acquire, possess and transfer gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, said defendants not being the persons or agents of the persons to whom said gasoline coupons were issued or by whom they were acquired, in accordance with regulations issued by the Price Administrator.

It was further a part of said conspiracy that the aforesaid defendant Verna Mae Bihn would steal, purloin and embezzle gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, from the First National Bank of Poughkeepsie, New York.

It was further a part of the said conspiracy that the aforesaid defendant Verna Mae Bihn would transfer gasoline ration coupons, the exact number and type being to

the Grand Jurors unknown, to the defendant George Wesley Bennett and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendant, George Wesley Bennett, would give, transfer and sell gasoline ration coupons, the exact number and type being to the Grand Jurors unknown, to one Joel Lewis and to others to the Grand Jurors unknown.

It was further a part of said conspiracy that the aforesaid defendants Verna Mae Bihn and George Wesley Bennett would share the moneys obtained from the sale of the aforesaid stolen ration coupons, the exact number and type being to the Grand Jurors unknown.

And then in the indictment follow overt acts, there being five in number: First, in pursuance of said conspiracy and, to effect the object thereof, at the Southern District of [fol. 13] New York and within the jurisdiction of this Court, on or about the 9th day of April, 1944 the defendants Verna Mae Bihn and George Wesley Bennett had a conversation.

Second, that in further pursuance of said conspiracy and to effect the objects thereof at the Southern District of New York, on or about and some time during the month of October, 1943 the defendant George Wesley Bennett had a conversation with Joel Lewis.

Third, that during the month of November, 1943 the defendant Bennett had a conversation with Joel Lewis.

Fourth, that during the month of June, 1944 the defendant Bennett had a conversation with the defendant Bihn; and the fifth and final overt act, that on or about the month of May, 1944 the defendant Bennett had a conversation with Janna Howe.

That is the indictment. That is the accusation. No inference whatever is to be drawn from the fact that the defendants were indicted. That is the legal means by which the case is presented to you and as I say no inference is to be drawn from the fact that the defendants here are indicted.

The defendants in this case as in all criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence stays with the defendants from the beginning to the end of the trial and until you are satisfied beyond a reasonable doubt of guilt.

The words "reasonable doubt" do not mean beyond all doubt. If that were the law you could not convict anyone. The law says "a reasonable doubt". A reasonable doubt means just what the words imply. It is a doubt which appeals to your reason, judgment and common sense and understanding. You cannot use that as a pretext or excuse or device to prevent you from performing an unpleasant duty.

[fol. 14] You and you alone are the sole and exclusive judges of the facts. Nothing said by the Court or counsel can take the place of your recollection of the facts, and even if the Court expresses an opinion on the testimony, it would not be binding upon you because it is for the Court to decide the law and it is your sole and exclusive province to decide the issues of fact, and in this case that means the guilt or innocence of the defendants on trial.

The Court has been called upon to rule on motions and objections. These rulings are matters of procedure only, and in and of themselves do not indicate any opinion on the part of the Court as to the innocence or guilt of the defendants. It is the province of the Court to decide the law and yours to decide the issues of fact.

As I have said, the indictment charges the defendants, and others whose names are unknown to the Grand Jury, with conspiracy to violate the law. You know, because you are all living in the United States, that because of the war situation there has been gasoline rationing and rationing of other materials and foods, and that various stamps have been issued, and that these stamps have value because without them you cannot secure the necessary gasoline or other commodities.

The Government charges here that these defendants entered into a conspiracy, that the conspiracy was to obtain the coupons and to sell them and get money for them.

A conspiracy is formed when two or more persons in any manner or through any contrivance come to a mutual understanding to accomplish a crime or unlawful purpose. It is a crime to unlawfully possess and transfer gasoline coupons. It is a crime to sell and embezzle such coupons. It is a crime to transfer them or give or sell or dispose of them. The Government charges that that is what these defendants did, that they entered into an agreement, an agreement to violate some law, and performed some overt act in the furtherance of that agreement. If that has been

[fol. 15] proven, the crime is complete. If not proven, there is no crime.

The elements of a criminal conspiracy are, first, an object to be accomplished; second, a plan or scheme embodying means to accomplish that object; third, an agreement or understanding between the two defendants whereby they became definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme or by any effectual means; and last by an overt act by one of these defendants, parties to the agreement, to effect the object of the conspiracy.

First, the object; second, the plan; third, the corrupt agreement; and last, by an act to carry out that agreement.

A conspiracy need not necessarily be established by direct evidence. Circumstantial evidence may be sufficient. Direct and circumstantial evidence differ merely in their logical relation to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue. A conviction may well be had upon circumstantial evidence. To warrant such conviction the proven facts must not only be consistent with the hypothesis of guilt but must exclude every other hypothesis save that of guilt. Circumstantial evidence alone is enough to support a verdict of guilty if the jury believes beyond a reasonable doubt the defendant is guilty on the evidence.

Let me give you an example. In our daily lives, we conclude matters upon circumstantial evidence almost all of our waking moments. If you awoke on a summer morning with the temperature about 90 and you looked out and saw that the trees and everything were wet, and water running in the gutters, you might conclude that it had rained, although you didn't see it rain. Or if you happened to sleep through the hurricane we had recently and woke up and saw many trees down and the damage it caused, you could [fol. 16] conclude that it was a pretty big wind that hit us, although you slept through it and didn't see any of it or hear it. Those are two examples, and there are many, many more that must occur to you.

As I say, we are concluding matters upon circumstantial evidence all the time.

In a conspiracy case a formal agreement need not be proven. It is sufficient to show that the parties were act-

ing together, understandingly, to accomplish some unlawful act even though one of the conspirators may do acts in furtherance of the unlawful design apart from the other. Having satisfied yourselves beyond a reasonable doubt that the Government has shown the agreement, it makes no difference what overt act was done, as long as you find beyond a reasonable doubt that an overt act was done to carry out the agreement. You must first decide whether there was a corrupt agreement, for the reason that the overt act must be one of the acts subsequently done to carry into effect the object of the original agreement. Has the Government proved and satisfied you beyond a reasonable doubt that these two defendants are guilty of a corrupt agreement and the performance of an overt act to carry out the agreement? If that has been proven, then the defendants are guilty. Otherwise they are not.

Overt acts may be innocent acts in and of themselves, or criminal in their very nature. To constitute an offense not only should an unlawful agreement be proved, but that one of the parties did an act to carry it out. Without an overt act it is no crime. The conspiracy is not effective until an overt act is committed by one or more of the conspirators.

Persons may conspire together to commit an offense against the United States, but if it stops with the agreement and nothing is done to carry into effect the object of the agreement, no criminal offense is committed; but the moment any act is done by any of the parties to the agreement, although the act in itself may be innocent, if the act [fol. 17] is done to effect the object of the conspiracy, that moment criminal liability is fixed. It may be done by only one party, but it binds the other party to the agreement, as all parties are concerned in the agreement. It makes no difference how many overt acts may be committed, they are not binding unless committed by parties to the agreement. But being parties to the agreement, they are responsible for whatever is done by any party to the agreement. Anything done by a conspirator in furtherance of the conspiracy, or anything said by a member of the conspiracy during the life of the conspiracy is binding upon the parties to the conspiracy. Any statements made subsequent to the conspiracy are only binding on the one who makes them. But, during the life of the conspiracy, any act that is done or any statement made in furtherance of the conspiracy is,

binding on the parties to the conspiracy even though the other party was not present.

In other words, a conspiracy is very much like a drama. There must be at least two actors. Some conspiracies have more, but you must have at least two.

The Government claims here that the part of one of the parties, Verna Mae Bihn, was to steal the stamps from the bank and hand them over to the defendant Bennett to dispose of them and that they would divide the money.

The defendant Bihn has taken the witness stand and she denies that she had any part in this conspiracy and says that she was employed in the bank—I am referring to the testimony, not for the purpose of emphasis, but to aid you in arriving at a verdict. You will consider all the testimony and evidence—but her testimony as I see it is that she was employed by the bank for some little time; she was a former school teacher and is a person of some intelligence and she was employed to keep the records of these stamps. It was her duty, as she says, to count the stamps and to check them, and if a depositor claimed too many, to detect it and send out word to him, that she said she did. [fol. 18] As we all know these stamps are rather important in these days. Without stamps for gasoline, you cannot use a car and if we didn't have stamps for food, we wouldn't eat. This is for the purpose of regulating the distribution of these various products because we are in a great war which is taxing the strength of this country. This law, this ration law, was passed and under it these stamps are of great value.

It was the defendant Bihn's duty to keep accurate records, to check these stamps. To show how careful they were, two people had to go to the incinerator when they were burned. The man who accompanied the defendant Bihn was a watchman at the bank or something of that kind. It was her duty to count the stamps, and after counting them, it was her duty to present to the cashier papers such as Exhibit 6 to be signed by the cashier. This was presented by the defendant Bihn to the cashier and the cashier refused to sign it and he had an accountant check it—Exhibit 5—then you heard the testimony as to the shortage of 37,023.5 gallons. That is a good deal of gasoline. The cashier refused to sign it and had a check made to find the shortage.

Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.

Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? Your are to decide that. [fol. 19] Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Mrs. Howe, the mother, you heard her testimony; how did that impress you? Did she impress you as somebody who would take the witness stand and deliberately commit perjury? And her daughters. You have also heard the testimony of Bennett where he testified before the Grand Jury and spoke of his participation in the disposition of the stamps.

You heard the testimony of the witnesses about having received stamps from him. Well, you are to decide it. Please do not lay aside your common sense when you decide it Apply it.

If any witness has wilfully testified falsely to a material fact, you have a right to disregard all the testimony of such witness or to retain such part as you believe. Use your common sense; such common sense as you use in your everyday lives. No greater judgment is required than that. True, you do not sit as jurors 365 days a year, but you do exercise judgment, I hope. I am sure you do. Use that judgment. A man may make a business proposition to you and you observe his demeanor and the way he expresses himself, whether he is frank, honest and truthful, and you decide whether you believe that man and you say, "Yes, I will take the word of that man against a dozen people."

Then you take another man and you say, "I will have nothing to do with him, not if he swore on a stack of Bibles as high as the world."

It is your duty to judge the credibility of a witness and his interest. Now just because a witness is interested does not mean that you are not to believe him. The law says you may consider his interest. How much has that interest altered or colored or motivated his testimony?

Conspiracies are usually formed in secret. I have never heard of one where the officials and the Police Department [fol. 20] and members of the Federal Bureau of Investigation and Judges and District Attorneys were invited to the City Hall at a certain time and place so that a certain conspiracy might be formed. I doesn't happen that way. These matters are done secretly. And it is not always by word of mouth; it may be by general understanding, the conduct of the parties.

Consider all those phases. You have to decide it. Were these two defendants engaged in a conspiracy to do any of these things charged, to acquire unlawfully these coupons, to possess them unlawfully, to transfer them, to steal them from the bank?

Did they agree and conspire as to that and did they perform an overt act? If so, they would be guilty. You are to say by your verdict.

A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt. If the facts and circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty. If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

This case is serious for the defendants and serious for the Government. You said at the beginning you would be fair to the Government and to the defendants. That is all I ask, a fair verdict upon the evidence and the evidence alone.

If a fact is once established you have a right to draw reasonable inferences from that evidence. Just apply your common sense. But you cannot draw an inference from an inference; but if a fact is established then you may draw an inference upon the fact established to your satisfaction.

Of course these defendants are not charged with any immoral acts here. That is not what we are trying here. But you may consider their relationship in connection [fol. 21] with the question of whether or not they did

commit a crime. I don't mean that they are to be convicted because of that. Of course not. But their interest in each other you may consider, as to whether they had any conversations and what their acts were. They are not to be convicted because of any immorality. That is not the charge.

You have heard the testimony of the witnesses. The trial has been very brief. I think if you apply your common sense you will have no difficulty in arriving at a proper verdict.

You are not concerned with the consequences of your verdict. Lay aside all consideration of prejudice, bias or sympathy.

I asked you if you would be fair and I asked you to be fair to the Government and to the defendants. Now take the case with an eye single to performing your duty.

The verdict will be either innocent or guilty as to each defendant.

Mr. Chapman: The defendant Bihn takes exception to your Honor's charge that she was charged with the duty of counting the stamps and preparing Government Exhibit 6.

The Court: I understood her to so testify. It is the jury's recollection of the facts that will control. If your recollection doesn't agree with mine you are to disregard my recollection. That was my recollection, that she testified that she prepared Exhibit 6 after reconciling it with the number of stamps. However your recollection will control.

Mr. Chapman: May I state my recollection?

The Court: No.

Mr. Chapman: I respectfully except. And I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. "Did she? Who did if she did not? You are to decide that." I except to that because it not part of the jury's duty.

[fol. 22] The Court: Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps.

Mr. Chapman: That is not the point of my exception, your Honor. I take further exception to your Honor's comment on the witness Susan Howe and Susan Bennett and Janna Bennett and I take exception to your Honor's

charge that the Grand Jury testimony of Bennett may be considered. That testimony is not binding on the defendant Bihn.

The Court: I said that two or three times during the trial and I repeat it now.

Mr. Saypol: In the course of the charge the Court made two statements which I think should be excepted to. Your Honor said to the jury "You cannot use reasonable doubt as a pretext for the performance of your duty."

The Court: I didn't say that. I said that they cannot use it as an excuse for failing to perform a duty. Of course the Government must establish the question of guilt beyond a reasonable doubt.

Mr. Saypol: Once they have a reasonable doubt they must stop.

The Court: Of course.

Mr. Saypol: I take an exception to the statement as to Mrs. Bihn's testimony as to the access of others to the coupons contained in the box, Government's Exhibit 5, to the rhetorical question which the Court asked, "Who would have a motive to steal it?" I say that is no concern of the jury and I ask that my exception be noted.

Mr. Chapman: I join in that, your Honor.

Mr. Saypol: I have some requests to hand up.

The Court: Why didn't you hand them up before you summed up?

Mr. Saypol: I didn't have them prepared then, your Honor.

[fol. 23] The Court: Let me take them. Of course one person alone cannot form a conspiracy.

Mr. Saypol: If the jury acquits one——

The Court: You except to what I said?

Mr. Saypol: Yes.

The Court: Very well. The law recognizes the difference between the crime of conspiracy and a conspiracy to commit a crime. I have told them that a conspiracy is one crime and that persons may conspire to commit other crimes.

Of course the verdict must be unaminous.

You take the case and consider it and be fair. I will send you the exhibits.

Mr. Hartfield: May I ask that the Court charge the jury that they will find listed in the indictment five overt acts and it is only necessary to find one.

The Court: If they have proved one overt act that is enough. They do not all have to be proved.

(The jury retired at 3:05 P. M.)

(At 5:10 P. M. the jury returned in the court.)

The Clerk: Miss Foreman, have you agreed on a verdict?
The Foreman: We have.
The Clerk: How do you find?
The Foreman: We find both defendants guilty of the charge of conspiracy.

(On motion of the defendants the jury was polled and each of the jurors stated that the verdict as above entered was his or her verdict.)

Mr. Chapman: On behalf of the defendant Bihn I move that the verdict be set aside as contrary to the law, contrary to the evidence and contrary to the weight of the evidence.
Mr. Saypol: I make the same motion.
The Court: Motions are denied.

[fol. 24] Sentence is adjourned to February 9, 1945, at 10:30 A. M. Defendant Bihn paroled on her own recognizance as to this case and bail continued on indictment 118-361. The defendant Bennett is remanded.

In District Court of the United States, Southern District of New York

C. 119-66

Violation of U. S. C. Title 18 Sec. 88.

United States of America vs. Verna Mae Bihn.

Conspiracy to possess and transfer gasoline ration coupons.

Judgment and Commitment

On this 9th day of February 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution

to be designated by the Attorney General or his authorized representative for the period of One Year and One Day. Defendant to surrender on 2-16-45. Released on own recognizance.

The Court recommends that defendant be sent to Federal Reformatory for Women, Alderson, W. Va.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Grover M. Moscowitz, United States District Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL AND GROUNDS OF APPEAL

Name and Address of Appellant

Verna Mae Bihn—Casa, Arkansas.

Name and Address of Attorney for Appellant

Henry K. Chapman, 291 Broadway, Borough of Manhattan, New York 7, N. Y.

Offense

The appellant, Verna Mae Bihn, and the defendant, George Wesley Bennett, were charged with conspiracy to violate Title 50, Appendix, Section 633, United States Code, in that they would unlawfully acquire, possess and transfer gasoline ration coupons, said defendants not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired.

DATE OF JUDGMENT—February 9, 1945

Description of Judgment

The appellant was convicted by the verdict of a jury on the 1st day of February, 1945, on the charge set forth in [fol. 26] Indictment C119-66, to wit: conspiracy to violate Title 50, Appendix, Section 633, in that they would unlawfully acquire, possess and transfer gasoline ration coupons,

said persons not being the persons or agents of the persons to whom said gasoline ration coupons were issued or by whom they were acquired in accordance with the regulations issued by the Office of Price Administration.

Sentence

On February 9, 1945, the appellant, Verna Mae Bihn, was sentenced to serve one year and one day in the Federal Womens Reformatory at Alderson, West Virginia.

The appellant, Verna Mae Bihn, is presently at liberty, the execution of her sentence having been stayed pending an application for bail to be given while her appeal is pending.

I, the undersigned appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment of conviction on the grounds set forth hereinbelow.

Verna Mae Bihn, Appellant.

Grounds of Appeal

1. The court erred in refusing to strike out portions of the evidence as to the Appellant herein for the reasons set forth in the motion to strike which said motion was made at the end of the Government's case and the end of the whole case.

2. The court erred in not granting the motion to dismiss the indictment made at the close of the Government's case and the end of the whole case, when it was repeated, and in refusing to grant the motions made to direct a verdict of acquittal as to the appellant.

[fol. 27] 3. The court erred in refusing to grant the motion to dismiss the indictment and to direct a verdict of acquittal at the end of the whole case on the ground that the Government had failed to establish the guilt of the appellant beyond a reasonable doubt.

4. The court erred in denying the motion made at the close of the entire case, to dismiss the indictment and to direct a verdict of acquittal, on the ground that the conspiracy as charged in the indictment had not been proved.

5. The court erred in refusing to grant the motion made on behalf of the appellant to set aside the verdict of the

jury as being contrary to the weight of the credible evidence and as contrary to the law.

6. The court erred in its charge to the jury as to the law in the case.

To Hon. John F. X. McGoey, United States Attorney for the Southern District of New York, U. S. Court House, Foley Square, Borough of Manhattan, New York City.

Clerk, United States District Court for the Southern District of New York, Foley Square, Borough of Manhattan, New York City.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The appellant, Verna Mae Bihn, makes the following assignments of error in the above entitled cause, to wit:

1. The court erred in its charge to jury by instructing it as follows:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that."

for the reason that by this instruction the court shifted the burden of proof to the defendant, Bihn, requiring the jury, [fol. 29] in effect, to find that she had by her proofs eliminated the possibility of her guilt.

2. The court erred in charging the jury, "Who would have a motive to steal them?", since the motive of other persons with access to the stamps, but not on trial, was not in issue.

3. The court erred in charging "Did she steal them?" "Who did if she didn't?" "You are to decide that." This was not any part of the jury's duty and said instructions served only to impress on the jury that it was incumbent on the defendant, Bihn, by her testimony to eliminate herself from those who could have stolen the ration coupons.

4. The court's charge "that the law recognizes the difference between the crime of conspiracy and a conspiracy to commit a crime", was erroneous, confusing and misleading.

Respectfully submitted, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 30] In United States Circuit Court of Appeals For the Second Circuit.

[Title omitted]

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the printing of the exhibits in the within action may be dispensed with and that in lieu thereof, the originals may be submitted to the court upon the argument of the appeal and that an order to said effect may be entered without further notice to either party.

Dated: July ——, 1945.

John F. X. McGohey, United States Attorney, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 31] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated that the foregoing Bill of Exceptions has been agreed upon as the record to be submitted to the United States Circuit Court of Appeals for the Second Circuit in the above entitled matter, and that the Clerk may certify the same as the record on appeal.

Dated: New York, July ——, 1945.

John F. X. McGohey, United States Attorney, Henry K. Chapman, Attorney for Defendant-Appellant.

[fol. 32] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 82

(Argued October 8, 1945. Decided November 15, 1945)

UNITED STATES OF AMERICA

against

GEORGE WESLEY BENNETT, Defendant, and VERNA MAE BIHN, Defendant-Appellant

Before L. Hand, Chase and Frank, Circuit Judges

Appeal from a Judgment of the District Court for the Southern District of New York. Affirmed

John F. X. McGohey, United States Attorney, for Appellee; David Hartfield, Jr., Assistant United States Attorney, of Counsel.

Henry K. Chapman, for Defendant-Appellant.

[fol. 34] CHASE, Circuit Judge:

The appellant was tried in the District Court for the Southern District of New York on an indictment charging that she and one George Wesley Bennett conspired together and with others unlawfully to acquire, possess and transfer gasoline ration coupons in violation of the provisions — 50 U. S. C., Appendix, § 633 and of the rules, regulations and orders duly adopted and promulgated pursuant thereto by the Office of Price Administration. It was alleged to be a part of the conspiracy that the appellant would steal gasoline ration coupons from the First National Bank of Poughkeepsie, New York; transfer them to Bennett; and share with Bennett the money obtained from the sale of them. After a trial by jury both the appellant and Bennett were found guilty and she has appealed from the judgment and sentence imposed upon her.

She relies wholly upon claimed error in the charge as ground for reversal and to understand the significance of that it will be helpful now to refer to what is called in the

record on appeal the "Stipulation of Agreed Facts" which follows:

"It is hereby stipulated and agreed by and between the appellant and the United States Attorney for the Southern District of New York that the following constitutes a narrative statement of facts in the case of United States v. Verna Mae Bihn and George Wesley Bennett. The parties to this stipulation agree that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal.

[fol. 35] Statement of Facts

"Appellant Verna Mae Bihn, the defendant George Wesley Bennett, and the husband of Mrs. Bihn, lived in the same three room apartment in Poughkeepsie from some time in August 1943, until February, 1944, at which time Bennett left the Bihn household to get married (Ex. 9). Mrs. Bihn was employed during this period of time at the First National Bank of Poughkeepsie. Her duties there during the greater part of her employment which extended from late summer of 1943 until the first part of September 1944, were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government (79).

"During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn (Exs. 9, 47, 41). Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as 'bingo' sheets). Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between

500 and 600 gallons. When these coupons were affixed [fol. 36] to 'bingo' sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed 'bingo' sheets on which they had been affixed (Ex. 9).

"When Bennett moved to his new home in February, there were resident in this new home, in addition to his wife, the witnesses Sussana Howe and Janna Howe, respectively, the mother-in-law and sister-in-law of the defendant Bennett (3, 61).

"One Sunday in May of 1944, Mrs. Bihn approached the home of the Bennetts and remained outside (51). Mrs. Howe asked her to leave. There ensued an altercation during which the co-defendant Bennett, Mrs. Howe, Janna Howe and Mrs. Bennett were present. Mrs. Howe told Mrs. Bihn that 'if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank.' Mrs. Bihn replied: 'Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too' (6, 63, Ex. 9).

"Mrs. Howe knew about the coupons which Mrs. Bihn had stolen because she and both her daughters (Mrs. Bennett and Janna Howe) had seen her son-in-law Bennett have in his possession in her house hundreds and perhaps thousands of coupons of all sorts (162, 8, 3, 4, 52, 53). Both she and her daughters had asked Bennett how he came to have these coupons, and Bennett replied that Mrs. Bihn gave them to him (58).

"Shortly after the quarrel on Mother's Day, Mrs. Bihn wrote a letter to the co-defendant Bennett, and enclosed a carbon copy of that letter in a separate envelope, addressed to Mrs. Howe (5, Ex. 1). Amongst [fol. 37] other statements in that letter was a reference to the quarrel which took place on Mother's Day, and the following is contained in that letter: 'I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me' (Ex. 1).

"Bennett stated to several of the Government witnesses that all the coupons he received he got from

Mrs. Bihn (36). On another occasion he said that all the coupons he got were from a girl 'he was fooling around with that worked in the bank.' The girl had been previously identified by the witness to whom the statement was made as Mrs. Bihn (43).

Part of Mrs. Bihn's duties at the bank with respect to rationing was to collect all rationing coupons which had been deposited with the bank and place them in a box for shipment to the Office of Price Administration. It was also Mrs. Bihn's duty to keep books showing the amount of ration currency deposited in the bank (85). It was also Mrs. Bihn's duty to keep other bank records in respect to rationing (87-88, 86). These records were all kept accurately (95, 105). It was Mrs. Bihn's duty to check the ration deposits after she had received them from the bank tellers (93, 98), and it was also her duty to keep the custody and control of the ration currency after it had been deposited. Mrs. Bihn did not receive the ration evidence from the clients of the bank, this was done by the bank tellers (91) but she would later check the deposits against the deposit slips. Frequently the slips were for more than the deposits actually made (92). The gasoline ration coupons were kept in a steel letter file which was [fol. 38] locked (98, 125). The keys to this file were kept in Mrs. Bihn's desk drawer which had no lock (99, 126). Mr. Travis, the bank cashier, had a key to the steel file. Three other persons, the note teller, assistant note teller and a stenographer had access to and the occasion to go to said steel file (99, 127) and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves (127). Others may have gone to the steel file and taken ration tokens (99), according to Mr. Travis, and Mrs. Bihn testified that if the ration bookkeeper was not present to furnish information or ration tokens, another employee would take care of the client (127). Mrs. Bihn signed and prepared a document which represented that 156,795.5 gallons of gasoline had been delivered to the Office of Price Administration (Ex. 8, 89, 87). It was also Mrs. Bihn's duty when she had sealed the box preparatory to shipping to the O. P. A. to prepare another document on which was noted the total contents of the box with

respect to each type of ration currency included therein (83-85). This document was then presented to the cashier of the bank, the witness Travis, for his signature. When the shipment was due in the forepart of September, Travis watched Mrs. Bihn prepare the box for shipment. Mrs. Bihn sealed the box and presented to Travis the document she was required to make out. This document represented on its face that there were 156,795.5 gallons of gasoline ration currency in the box (Ex. 6). Travis took the box, after having watched Mrs. Bihn prepare it, and kept it at his desk until the bank's auditor arrived that night (83). The bank's auditor examined the box and found that there were only 119,772 gallons of ration currency in the box and that there were 37,023.5 gallons missing (115).

[fol. 39] "Subsequent to the time of indictment, and prior to trial of the case, the witness Janna Howe, the 17 year old sister-in-law of the co-defendant Bennett received several 'phone calls at school from Mrs. Bihn who at one time said to her '* * * I better be careful and she would Be waiting for me when I got out' (66)."

While the introductory paragraph of this stipulation refers to what follows as "a narrative statement of facts" and it is stated that the "parties to this stipulation agree that the facts mentioned are accurate" they also reserved the right to refer "to additional facts in the record on the argument for appeal." It is fairly evident from this reservation that the appellant did not concede that the actual facts were as stated but that there was evidence which, if believed, would have supported findings by the jury that the facts were as stated in the stipulation. That is enough to show that there was evidence on which to submit the case against the appellant to the jury and no argument to the contrary has been made. To be sure the appellant's own testimony and other evidence she introduced, some of which tended to show that some of the government's witnesses were biased and prejudiced against her, required the jury to resolve issues as to credibility and the weight to be given the evidence found worthy of belief before it could find a verdict of guilty and perhaps not all the so-called facts in the stipulation were found by the jury. That

is immaterial now since the transcript of what transpired at the trial is a part of the record on appeal. We may, and do, look to that to discover, regardless of the stipulation of the parties, whether there was sufficient, though in part contradicted, evidence to support the verdict and find that there was.

[fol. 40] The evidence that gasoline ration coupons had been stolen from the bank was so clear and undisputed that it was a foregone conclusion that the jury would so find. The claimed error is not that the judge took that for granted in his charge. It is that he instructed the jury in effect that it must decide not only that the appellant did not steal them, but who did, before it could acquit her, thus putting the burden upon her to prove her innocence by showing the identity of the thief or thieves. If the charge is fairly open to such an attack reversible error was committed, for of course the appellant had no burden to prove anything but was presumed to be innocent and was entitled to be acquitted if the evidence as a whole was merely too inconclusive to prove her guilt to the satisfaction of the jury beyond a reasonable doubt. *Powell* v. *Alabama*, 287 U.S. 45; *U. S.* v. *Wishnatzki*, 2 Cir. 77 F. (2) 357.

After charging adequately and accurately on the burden of proof, presumption of innocence, the conspiracy as laid in the indictment and what had to be proved to establish the guilt of the appellant, the judge called the attention of the jury to the appellant's defense as follows:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy [fol. 41] to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't?

You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant."

The appellant's trial attorney took exception to the "charge to the jury that it is the jury's duty to find out who did steal the stamps.' 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty." The judge disposed of this exception by saying, "Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps." The attorney replied, "That is not the point of my exception, your Honor," and so the matter was left.

Although the attorney thus indicated that he knew the judge had not understood the "point" of his exception, he made no effort to make that clear. If it could reasonably be thought that any juror might have misunderstood the judge to mean that, contrary to what he had already clearly charged on the burden of proof and the presumption of innocence, the appellant was bound to prove who did steal the stamps if she did not, it would still be obvious that the attorney was apparently satisfied to take the exception he did rather than to take adequate steps to point out the claimed error, or ambiguity, in the charge. Had the experienced judge who tried this case been aware that the attorney was objecting on the ground which has been argued in this court, it is inconceivable that he would not have made it abundantly plain at once that his language should not have been so construed or misconstrued.

[fol. 42] However that may be, the language used is not, we think, ambiguous in its setting or reasonably to be understood to mean that the appellant had the burden to prove anything as a condition upon her acquittal. Almost in the same breath the judge told the jury that the appellant was not charged with stealing the coupons "but with conspiracy to do all these things" and that "you have a right to consider whether she did steal them, on the question of her intent. Did she steal them? Who did if she didn't? You are to decide that." The fair import of such language is not that the jury had to determine who in fact stole the coupons if it failed to find that she did but to decide whether

she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged.

Judgment affirmed.

Frank, Circuit Judge, dissents with separate opinion.

Frank, Circuit Judge (dissenting):

1. In order to explain my dissent, it is first necessary to point to some facts not mentioned in the majority opinion. Those facts will, I think, dissipate what seems to me to be the incorrect impression created by that opinion that almost certainly appellant was guilty, as charged, of stealing the coupons and giving them to the co-defendant Bennett (who, having expressly admitted that he had illegal possession of them, was found guilty and sentenced, and who does not appeal). For the transcript of the evidence at the trial, by reference made a part of the record in this court, shows the following:

[fol. 43] (a) The co-defendant, Bennett, did not testify; but statements made by him out of court were offered in evidence. The trial judge explicitly ruled (and correctly) that these statements were admissible as against Bennett, but must not be considered by the jury with reference to appellant, Bihn. It was, however, solely from those statements thus made by Bennett that there derives the following portion of the stipulation:

"During the period when Bennett was living in the Bihn household, Mrs. Bihn on many occasions would bring home gasoline ration coupons. When Mrs. Bihn's husband was not present, Mrs. Bihn would give these coupons to Bennett. Bennett would take these coupons, sell them, return home and divide the money received from the sale of these coupons with Mrs. Bihn. Sometimes Mrs. Bihn would bring home loose gasoline ration stamps and sometimes she would bring home gasoline ration stamps already affixed to gummed O. P. A. forms called O. P. A. Forms R 120 (known in the gasoline trade as 'bingo' sheets). Mrs. Bihn brought these stamps home to Bennett on approximately ten occasions. The average amount of coupons which she brought home was between 300 and 500 gallons

each time. The largest amount of coupons that Mrs. Bihn ever brought to Bennett was between 500 and 600 gallons. When these coupons were affixed to 'bingo' sheets, Mrs. Bihn would soak these coupons in water and give them to Bennett to sell after they had been removed from the gummed 'bingo' sheets on which they had been affixed * * * Bennett stated to several of the Government witnesses that all the coupons he received he got from Mrs. Bihn."

As Bennett's statements were not in evidence as to appellant, these portions of the stipulation should, I think, be wholly disregarded.

[fol. 44] (b) The transcript of the evidence shows that Bennett's wife, mother-in-law and sister-in-law were jealous of appellant because of her relations with Bennett before his marriage. Yet it was solely from their testimony that the following portion of the stipulation derives:

"Mrs. Howe told Mrs. Bihn that 'if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank.' Mrs. Bihn replied: 'Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too.'"

The transcript shows that appellant, who took the witness-stand and denied that she had stolen any coupons, gave a different version of these remarks: She testified that, on that occasion, Bennett's sister-in-law and mother-in-law had accused her of having written certain letters to Bennett; that she had then denied having done so; and that the mother-in-law had then said to her "I think the F. B. I. will be interested to know about you," but made no mention of gasoline coupons. Appellant admitted that later she wrote a letter to Bennett saying, "I didn't miss that crack about the F. B. I. * * * It looks to me you are trying to break into prison with your bare hands * * * It will hurt you more than me." She testified concerning this letter as follows:

> "Q. What did you mean by, 'It looks to me you are trying to break into prison with your bare hands'? A. Because he showed me a postcard his wife received and asked me if I wrote it, and I asked him if he wrote it. He told me once about having written a postal-

card to another girl to get rid of her, and it looked like the same method to me.

[fol. 45] "Q. What did you mean by saying, 'It will hurt you more than me'? A. Because they talked, the sister-in-law and the mother-in-law, about the letters that they were going to the F. B. I. with."

(c) The transcript also shows the following: As, from time to time, the coupons were deposited in the box, appellant made entries of the deposits. Subsequently, without again examining the contents of the box, appellant, from her previous entries, compiled the written statement which, it turned out, gravely overstated the amount of gasoline represented by the coupons in the box. But, in the interval between the time when she made her first entries and the time when she prepared the inaccurate statement, not less than four persons other than appellant had had access to the box; among them was a Miss Shannon with whom (so appellant testified) Bennett had a far more than casual acquaintance.

2. Thus, disregarding (as we should) that part of the stipulation based upon Bennett's statements, there is no direct evidence of theft by appellant except the testimony of Bennett's wife, mother-in-law and sister-in-law, which might easily have been biased. The only other evidence of her guilt consists of an inference which could reasonably —but need not—be drawn from the gross inaccuracy of the written statement made by appellant of the contents of the box. Accordingly the verdict may well have turned on whether such an inference was made by the jury.

In these circumstances—and remembering that the indictment charged, as an essential part of the conspiracy, that appellant had stolen the coupons—it was of course entirely legitimate for appellant to argue thus to the jury: Since any one of four other persons might have stolen the [fol. 46] coupons, there could easily be a reasonable doubt as to appellant's guilt. That issue was obviously crucial.

It was in this context that the judge, in the middle of his instructions, told the jury: "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a

right to consider whether she did steal them, on the question of intent. *Did she steal them? Who did if she didn't? You are to decide that.*"

Considering what I have called the "crucial issue," it is highly likely that the jurors did not take this remark lightly. They had before them uncontradicted evidence by which, as they knew, appellant was trying to persuade them that, since the coupons might have come into Bennett's possession via any one of four other persons, there was a reasonable doubt as to appellant's guilt. Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their "duty" (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. See, e.g., *Boatright* v. *United States*, 105 F. (2d) 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. (2d) 189, 192 (C. C. A. 5); cf. *United States* v. *Wishnatzki*, 77 F. (2d) 357, 360 (C. C. A. 2). The charge would perhaps not have been so interpreted by one with a well trained legal mind; but the Supreme Court has admonished us that the minds of jurors, not being so trained, are usually incapable of subtle discriminations. *Shepard* v. *United States*, 290 U. S. 96, 104. As we have no basis for assuming that the jurors did not accept this charge at its face value, I think we should conclude that it was prejudicially erroneous.

[fol. 47] True, the judge also gave the usual general instructions about the burden of proof and presumption of innocence. But, in the face of this specific instruction, the best that can be said is that the jurors may easily have been confused. It has often been held that a verdict should be reversed where, when general instructions are inconsistent with a specific instruction, the jury may have been confused. See, e. g., *Drossos* v. *United States*, 2 F. (2d) 538, 539 (C. C. A. 8); *Cummings* v. *Pennsylvania R. Co.*, 45 F. (2d) 152 (C. C. A. 2); *Schroble* v. *Lehigh Valley R. Co.*, 62 F. (2d) 993, 996 (C. C. A. 2); cf. *Shepard* v. *United States*, *supra*.

When the judge had concluded his instructions, appellant's lawyer excepted as follows: "I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did

if she did not? You are to decide that.' I except to that because it is not part of the jury's duty."

That was a clear enough statement of the nature of the judge's error; surely clear enough for one whom my colleagues characterize as an "experienced trial judge." It advised him that it was erroneous to tell the jury that, as part of its duty, in order to acquit, it must decide what person stole the coupons if appellant did not. The judge, thus warned, did nothing to correct the error, saying merely, "Yes, I say that was not the crime, but the question is whether these defendants entered into a conspiracy to steal, possess, and transfer these stamps." If that meant anything it meant that appellant was not charged with the substantive crime of theft but with theft as part of a conspiracy, a question not raised by the exception. This comment did not correct the erroneous instruction that unless, from the evidence, the jury found that some other identified person stole the coupons, it must conclude that appellant did.

[fol. 48] After the trial judge thus commented, appellant's lawyer said, "That is not the point of my exception." My colleagues suggest that that rejoinder was insufficient, that the lawyer should have made his exception more explicit. I do not agree because, as stated above, I think that the reasons originally given for the exception were adequately clear.

3. It is obvious, from my colleagues' discussion of the evidence, that they believe appellant was guilty. Accordingly, this seems to be another instance in which they are tacitly applying their unique interpretation of the "harmless error" doctrine. Their position, as explicitly stated in *United States* v. *Liss*, 137 F. (2d) 995, 999 (C. C. A. 2) is that there is a "*modern disposition to assume that an error has been harmless.*"[1] As I have several times heretofore noted in detail, I think that a mistaken assumption.[2]

In *McCandless* v. *United States*, 298 U. S. 342, 347, the Court said that the "harmless error" statute (28 U. S.

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[1] Emphasis added.

[2] See, e. g., *United States* v. *Rubenstein*, 151 F. (2d) 174 (C. C. A. 2); *United States* v. *Liss*, 137 F. (2d) 995, 1001, 1005 (C. C. A. 2); *Keller* v. *Brooklyn Bus Corp.*, 128 F. (2d) 510, 513, 514-515 (C. C. A. 2).

C. A. (391) "does not change the well settled rule that an erroneous ruling which relates to the substantial rights of a party is a ground for reversal unless it *affirmatively*[3] appears from the whole record that it was not prejudicial." In *Bruno* v. *United States*, 308 U. S. 287, 293-294, the Supreme Court (reversing this court) said that this statute was intended merely "to prevent matters concerned with the etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." In [fol. 49] *Weiler* v. *United States*, 323 U. S. 606, 611, the Court, citing the *Bruno* case, said, "We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." All Circuits other than ours in which the question has been considered have acted in accordance with these Supreme Court rulings.[4]

Although usually I concur in the established precedents of this court even when I think them erroneous, I deem it not improper to continue to dissent in cases of this kind until the Supreme Court tells me that I am wrong.

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of November one thousand nine hundred and forty-five.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

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[3] Emphasis as in the original.

[4] *Lynch* v. *Oregon Lumber Co.*, 108 F. (2d) 283, 285-286 (C. C. A. 9); *Farris* v. *Interstate Circuit*, 116 F. (2d) 409, 412 (C. C. A. 5); *Fort Dodge Hotel Co.* v. *Bartell*, 119 F. (2d) 253, 259 (C. C. A. 8); *Worcester* v. *Par Torpedo Co.*, 127 F. (2d) 945, 947 (C. C. A. 7); *Evansville Container Corp.* v. *McDonald*, 132 F. (2d) 80, 85 (C. C. A. 6); cf. *Little* v. *United States*, 73 F. (2d) 861, 866 (C. C. A. 10).

UNITED STATES, Plaintiff-Appellee,

v.

VERNA MAE BIHN, Defendant-Appellant; GEORGE WESLEY BENNETT, Defendant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 51] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. Verna Mae Bihn. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 15, 1945. Alexander M. Bell, Clerk.

[fol. 52] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 11, 1946.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

TERM 1945

No. 675

VERNA MAE BIHN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID V. CAHILL,
HENRY K. CHAPMAN,
Attorneys for Petitioner.

RECORD PRESS—NYC—REctor 2-2638

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IN THE

Supreme Court of the United States

TERM 1945

No. _____

VERNA MAE BIHN,

Petitioner.

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered on November 15, 1945, affirming a judgment of conviction in this criminal cause.

Opinions Below

There was no opinion in the District Court.

The affirmance in the Circuit Court of Appeals was by a vote of 2 to 1, Frank, Circuit Judge, dissenting and writing a separate opinion. The majority and dissenting opinions of the Circuit Court of Appeals have not yet been reported, but they are printed at the end of the record submitted herewith.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Sec. 347, Title 28 United States Code).

Questions Presented

1. In this case, under an indictment charging conspiracy (Title 18, Section 88) to violate Title 50, Appendix, Section 633, United States Code, was it not prejudicial error on the part of the District Court to instruct the jury in the manner it did, at folio 54 of the record, to wit:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do

all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that."

2. Did not the charge of the District Court at folio 54 of the record nullify the presumption of innocence and "shift the burden of proof" to the petitioner requiring her to exculpate herself?

Exception to this part of the charge was duly taken (R. ff. 63-64).

Statutes Involved

Section 88, Title 18, United States Code:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

General Ration Order #8

"Sec. 2.6. Acquisition, Use, Transfer or Possession of Ration Document. No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall transfer a ration document except in accordance with the provisions of a ration order."

"S. M." in parentheses refers to original stenographic copy of minutes of trial. "R. f," refers to folio of printed Transcript of Record.

RATION ORDER #5

This order which is voluminous and refers to the banking of ration currency is not being set out in extenso because it has no particular relevancy to the questions raised by the petition and is not essential to the consideration or determination of the questions presented.

Statement

The object of the conspiracy alleged was to unlawfully acquire, possess and transfer gasoline ration coupons contrary to Section 633(2)a(5) of Title 50, Appendix, United States Code, and in violation of Ration Order #5c and General Ration Order 8#.

The appellant below and petitioner here, was employed in a bank in Poughkeepsie, New York. During the greater portion of the period of her employment of about a year, she was in charge of ration currency bookkeeping which the bank undertook on behalf of the Government (R. f. 22). During said time she was acquainted with one, George Wesley Bennett, who for a time boarded at the apartment in which she and her husband resided (R. f. 21).

It is further alleged that during this time she would steal ration coupons from the deposits made at the bank and give them to Bennett to sell and they would divide the proceeds

Bennett was married in February, 1944 and moved from the Bihn home and went to live with his mother-in-law, Susanna Howe. His sister-in-law, Janna Howe, was also a member of the household. During an argument and altercation in May, 1944, outside of their home, the mother-in-law Susanna Howe, it is claimed, told the appellant "if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." Ap

pellant is alleged to have replied: "Go ahead. Your son in-law is in it just as deep as I am and if I go to prison he will go too" (S. M. 6, 63).

The Howes testified and Mrs. Bennett, who also testified, stated they had seen large quantities of these coupons in Bennett's possession and that he had upon inquiry from them, admitted receiving them from appellant (S. M. 58).

The testimony was that Bennett also told other Government witnesses that he was getting the coupons from a girl working in the bank (S. M. 36) with whom he was fooling around; and that this girl was the appellant was testified to by one of these witnesses (S. M. 43).

Shortly after the aforementioned quarrel and altercation, appellant wrote a letter to Bennett and sent a carbon copy to Mrs. Howe. In this letter she referred to the quarrel and said among other things not presently relevant, "I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me" (Exh. 1, S. M. 31).

Appellant explained these statements, oral and written, by testifying that Bennett's wife, mother-in-law and sister-in-law were jealous of her because of her relations with Bennett prior to his marriage. She denied she had stolen any coupons. She gave a different version of her remarks and testified that when accused by them of having written certain letters to Bennett, she denied having done so and that the mother-in-law then rejoined "I think the F. B. I. would be interested to know about you", but didn't make any mention of gasoline coupons. The appellant further admitted having written in her letter to Bennett "I didn't miss that crack about the F. B. I. It looks to me like you are trying to break into prison with your bare hands, etc." As to

this, appellant testified that Bennett had shown her a postal card which he stated his wife had received and asked her whether she had written it. She in turn asked him if he had written it since he had told her once of having written a postal card to another girl in order to get rid of her and it looked to her like he was pursuing the same method (S. M. 135-138, 145-147).

With reference to the remark "it will hurt you worse than me", appellant stated that the sister-in-law and mother-in-law had threatened to go to the F. B. I. relative to letters and postal cards received by them (S. M. 146).

The coupons were not received at the bank by appellant when deposited by the bank's clients but it was her duty to check these deposits after receipt from the bank tellers and notify the depositors of any errors. Frequently the deposit slips indicated greater deposits than were actually made (R. ff. 28, 29) (S. M. 125, 126).

Appellant made daily entries in the bank's books of the deposits of ration evidence. The ration coupons were kept in a steel letter file to which admittedly at least four other named persons had equal access and occasion to use for the same purpose, *i.e.*, to deposit and take ration evidence when required by the bank's operations. Later, appellant would make up a recapitulation sheet of the ration evidence deposited, without however, again counting the actual coupons and tokens but solely from the figures on the daily sheet (S. M. 125, 127).

Every two weeks, appellant would take from the steel letter file the accumulated ration coupons and tokens and place them in a cardboard box. At first these would be destroyed at the city incinerator. Later, they were forwarded to the Office of Price Administration in New York City. When doing this she would make up a form supplied by the Office of Price Administration showing the con-

tents of the box. In arriving at the figures on this form, she would not make an actual count of the coupons and tokens but would take these figures from the daily deposit and recapitulation sheets (S. M. 81).

During these two week intervals at least the four others named who were employed by the bank had free access to the contents of the steel letter file containing the ration evidence (S. M. 99).

On or about September 6, 1944, appellant prepared an O. P. A. form as above described and a box for shipment to the Office of Price Administration presumably containing the amounts of coupons of various kinds as indicated therein. She presented both to the bank cashier for his signature as was customary. Instead of signing the form, he retained it and the box and caused the contents to be checked against the figures on the form. This disclosed a shortage of coupons of the value of 37,023½ gallons, the box containing ration evidence of 119,772 gallons whereas the form had on it the figure 156,795½ gallons (S. M. 81, 84, 85).

All the other ration evidence, shoes, meat, processed foods, etc., tallied exactly (S. M. 116, 117).

The foregoing resume is being furnished merely to apprise the Court of some of the facts alleged in the indictment and proof offered by the Government and not because any error is claimed in the admission, receipt or exclusion of evidence during the trial.

The appeal in the Court below was grounded solely upon error in the charge as to the law by the District Court and more particularly upon the questions presented above.

POINT I

By the said instructions the Court shifted the burden of proof, requiring the appellant to exculpate herself.

The appellant took the witness stand in her own behalf. She testified at length to the manner of the banking of ration evidence. She said that the ration coupons were kept in a steel letter file which had a lock; and that the keys to this file were kept in appellant's desk which had no lock. Mr. Travis, the bank cashier, who testified for the Government had a key to the steel file. Three other persons, the note teller, the assistant note teller and a stenographer, had access to and occasion to go to the steel letter file; they would not ask appellant for the key, but would go to her desk and help themselves. Other bank employees may have gone to the steel file and taken ration tokens said Mr. Travis and the appellant testified that if she were not available to furnish either ration information or tokens, another employee of the bank would see to the clients' wants. Mr. Travis testified that appellant's records were accurately kept by her (R. f. 28).

Under these circumstances with a number of persons having access to the file in which the ration coupons were kept, there was a fair argument and ground for reasonable doubt as to appellant's guilt, which should have been submitted impartially by the Court to the jury. But the Court instead, nullified the favorable fact situation and precluded its consideration, by placing the appellant on one side, all other persons on the other side and then asked the rhetorical question, "Who did it, she didn't?"

At the close of the testimony on both sides, the jury, beyond listening to the charge of the Court had but one duty to perform, *i.e.*, to determine whether the evidence adduced

at the trial was adequate to convince it beyond a reasonable doubt that the appellant was guilty of the conspiracy charged by the indictment. No other duty devolved on it, save to acquit the appellant, if it were not so satisfied. The jury was not under a duty to decide who stole the rationing coupons if appellant didn't. Yet they were charged to do so in *haec verba*.

The instruction placed on the jury the duty of finding who the guilty person was assuming that someone was guilty. The proper instruction would have confined them to the only question presented, whether appellant committed the crime charged. The dissenting opinion (FRANK, *C. J.*), strongly emphasizes this lapse on the part of the trial judge.

After referring to the transcript of the minutes of the trial, FRANK, *C. J.*, said:

> "(c) The transcript also shows the following: As, from time to time, the coupons were deposited in the box, appellant made entries of the deposits. Subsequently, without again examining the contents of the box, appellant, from her previous entries, compiled the written statement which, it turned out, gravely overstated the amount of gasoline represented by the coupons in the box. But, in the interval between the time when she made her first entries and the time when she prepared the inaccurate statement, not less than four persons other than appellant had had access to the box; among them was Miss Shannon with whom (so appellant testified) Bennett had a far more than casual acquaintance.
>
> 2. Thus, disregarding (as we should) that part of the stipulation based upon Bennett's statements, there is no direct evidence of theft by appellant except the

testimony of Bennett's wife, mother-in-law and sister-in-law, which might easily have been biased. The only other evidence of her guilt consists of an inference which could reasonably—but need not—be drawn from the gross inaccuracy of the written statement made by appellant of the contents of the box. Accordingly the verdict may well have turned on whether such an inference was made by the jury.

In these circumstances—and remembering that the indictment charged, as an essential part of the conspiracy, that appellant had stolen the coupons—it was of course entirely legitimate for appellant to argue thus to the jury: Since any one of four other persons might have stolen the coupons, there could easily be a reasonable doubt as to appellant's guilt. That issue was obviously crucial.

It was in this context that the judge, in the middle of his instructions, told the jury: 'Who would have a motive to steal them? Did she take these stamps. You have a right to consider that. She is not charged with stealing,' but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. *Did she steal them. Who did it she didn't? You are to decide that.*'

Considering what I have called the 'crucial issue,' it is highly likely that the jurors did not take this remark lightly. They had before them uncontradicted evidence by which, as they knew, appellant was trying to persuade them that, since the coupons might have come into Bennett's possession via any one of four other persons, there was a reasonable doubt as to appellant's guilt. Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge

erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. See, *e.g.*, *Boatright* v. *United States*, 105 F. (2d) 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. (2d) 189, 192 (C. C. A. 5); cf. *United States* v. *Wishnatzki*, 77 F. (2d) 357, 360 (C. C. A. 2). The charge would perhaps not have been so interpreted by one with a well trained legal mind; but the Supreme Court has admonished us that the minds of jurors, not being so trained, are usually incapable of subtle discriminations. *Shepard* v. *United States*, 290 U. S. 96, 104. As we have no basis for assuming that the jurors did not accept this charge at its face value, I think we should conclude that it was prejudicially erroneous.

True, the judge also gave the usual general instructions about the burden of proof and presumption of innocence. But, in the face of this specific instruction, the best that can be said is that the jurors may easily have been confused. It has often been held that a verdict should be reversed where, when general instructions are inconsistent with a specific instruction, the jury may have been confused. See, *e.g.*, *Brosseau* v. *United States*, 2 F. (2d) 538, 539 (C. C. A. 8); *Cummings* v. *Pennsylvania R. Co.*, 45 F. (2d) 152 (C. C. A. 2); *Schradle* v. *Lehigh Valley R. Co.*, 62 F. (2d) 993, 996 (C. C. A. 2); cf. *Shepard* v. *United States*, *supra*."

While the court charged generally on the essentials in structions required in criminal cases, it went far beyond what was required and in the particular instructions found at folio 54, fell into serious error, prejudicing the appellant and "shifting the burden of proof" to her.

Bearing in mind, the testimony of the appellant adverted to above, which was stamped as true by the testimony of the witness, Travis, testifying for the Government, the instruc

tions so given had the effect of telling the members of the jury that if by her testimony the appellant had not convinced them that someone else had stolen the ration coupons, then the appellant must have done so. It had the effect of requiring the appellant to convince the members of the jury that she was not, instead of requiring the Government to convince them that she was, guilty of the charge in the indictment.

Ward v. *United States* (C. C. A. 5), 96 F. (2d) 189, 192;

Boatright v. *United States* (C. C. A. 8), 105 F. (2d) 737, 740;

Drossos v. *United States* (C. C. A. 8), 2 F. (2d) 538.

The Court by its charge disparaged the claim of appellant that the theft of the ration coupons might well have been committed by the others who admittedly had equal access to them in the letter file, emphasized her responsibility in the matter, and became an advocate for the Government on this very important issue by indicating that the appellant would be motivated to steal them while at the same time, by inference, deprecating the possibility of a like motive on the part of the other bank employees.

Boatright v. *United States, supra.*

If there was any confusion engendered in the minds of the jury, it was created by the Court in giving the instruction complained of to which proper, adequate and specific exception was taken.

It is submitted that in order to establish substantial error it is not required of appellant that she definitely point out with exactitude the prejudice in the Court's instructions.

Little v. *United States* (C. C. A. 10), 73 F. (2d) 861, 866.

POINT II

Counsel for appellant took a proper, specific and adequate exception to the District Court's instruction, in the very words thereof and was not required to pursue the Court for an elucidation thereof.

The majority of the Circuit Court of Appeals takes the attitude, unreasonably, it is respectfully submitted, that appellant's attorney should have persisted in his exception to the Court's erroneous instruction on the law and insisted that it be corrected. But counsel did except thereto in unmistakable language, in fact, in the very words employed by the Court when giving the instructions. When the Court failed to pay heed to this exception so clearly put but instead went on to reiterate that the charge in the indictment was that of conspiracy and not of a substantive crime, he again forcibly called the Court's attention to its error when he stated that that was not the point of his exception.

Should he have persisted in requesting the Court to further clarify its instruction? While the majority of the Court below believes that was required of him, the authorities are to the contrary. All that is required is that the exception to the instruction be specific and not merely general, that it direct the attention of the Court to the alleged mistake and thus enable it to correct its error, if any there be.

Hewitt v. *United States* (C. C. A. 8), 110 F. (2d) 119;

Silkworth v. *United States* (C. C. A. 2), 10 F. (2d) 711, 721;

Muench v. *United States* (C. C. A. 8), 92 F. (2d) 332, 336;

Diehl v. *United States* (C. C. A. 8), 98 F. (2d) 545, 547;

Hall v. *Aetna Life Ins. Co.* (C. C. A. 8), 85 F. (2d) 447, 450;

Rules of the Circuit Court of Appeals for the Second Circuit, 9, 10.

To have persisted and reiterated an objection already clearly stated would probably have produced no result except to draw the fire of the Court and to prejudice the appellant before the jury. An experienced trial judge like the one presiding could not have failed to understand the point and that is all that can reasonably be required for consideration of the error and resulting prejudice.

POINT III

The erroneous instruction was serious, prejudicial and not mere harmless error.

Although the appeal in the Court below brought up for review only the charge of the Court and only this was printed in the record, the Appellate Court saw fit to read the transcript of the minutes of the trial. It would seem that after reading this transcript the majority of the Court came to the conclusion that the appellant was undoubtedly guilty of the conspiracy charged by the indictment and *a fortiori*, any error in the Court's instructions to the jury which rendered a verdict of guilty was harmless.

The guilt or innocence of the appellant was not to be passed upon by the Court below on this appeal. That issue was not raised there. What was to be determined was whether the jury had been sufficiently and properly instructed on the law.

As was said in *Miller* v. *United States* (C. C. A. 10), 120 F. (2d) 968, 972:

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

The dissenting opinion in the Court below discloses that the Circuit Court of Appeals for the Second Circuit which passed on the instant case has adopted a view of the "harmless error" doctrine which is contrary to that expressed in opinions of all the other Circuits and at variance with the pronouncements of the Supreme Court of the United States in *McCandless* v. *United States*, 298 U. S. 342, 347; *Brano* v. *United States*, 308 U. S. 287, 293-294 and *Weiler* v. *United States*, 323 U. S. 606, 611.

This conflict can be resolved only by a decision of this Court.

CONCLUSION

It is respectfully submitted that the questions submitted indicate serious error which warrants the exercise of this Court's supervisory jurisdiction. The attitude of the Circuit Court of Appeals for the Second Circuit in appraising the "harmless error" doctrine being at variance with that of all the other Circuits, which have apparently adhered to the decisions of this Court when the question arose, requires review by this Court and an unmistakable statement of the rule applicable for observance in all the Circuits.

Respectfully submitted,

DAVID V. CAHILL,
HENRY K. CHAPMAN,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, *Petitioner*

—*v.*—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

No opinion was rendered by the District Court.

The majority and dissenting opinions in the circuit court of appeals (R. 25-37) are reported in 152 F. (2d) 342-349, sub nom. *United States* v. *Bennett, et al.*

Jurisdiction

The judgment of the circuit court of appeals was entered November 15, 1945 (R. 38, f. 51). The petition for a writ of certiorari was filed December 17, 1945. Certiorari was granted by order of this Court on February 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. In this case, under an indictment charging conspiracy (Title 18, Section 88) to violate Title 50, Appendix, Section 633, United States Code, was it not prejudicial error on the part of the District Court to instruct the jury in the manner it did, at R. 15, f. 18 of the record, to wit:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that."

2. Did not the charge of the District Court at R. 15, f. 19 of the record nullify the presumption of innocence and "shift the burden of proof" to the petitioner requiring her to exculpate herself?

Statutes Involved

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a

misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

> SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

Statement

The object of the conspiracy alleged was to unlawfully acquire, possess and transfer gasoline ration coupons contrary to Section 633(2)a(5) of Title 50, Appendix, United States Code, and in violation of Ration Order #5c and General Ration Order #8.

The appellant below and petitioner here, was employed in a bank in Poughkeepsie, New York. During the greater portion of the period of her employment of about a year she was in charge of ration currency bookkeeping which the bank undertook on behalf of the Government. During said time she was acquainted with one, George Wesley Bennett, who for a time boarded at the apartment in which she and her husband resided (R. 6).

It is further alleged that during this time she would steal ration coupons from the deposits made at the bank and give them to Bennett to sell and they would divide the proceeds.

Bennett was married in February, 1944 and moved from the Bihn home and went to live with his mother-in-law, Susanna Howe. His sister-in-law, Hanna Howe, was also a member of the household.* During an argument and altercation in May, 1944, outside of their home, the mother-in-law, Susanna Howe, it is claimed, told the appellant "if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." Appellant is alleged to have replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too" (S. M. 6, 63).*

The Howes testified and Mrs. Bennett, who also testified, stated they had seen large quantities of these coupons in Bennett's possession and that he had upon inquiry from them, admitted receiving them from appellant (S. M. 58).

The testimony was that Bennett also told other Government witnesses that he was getting the coupons from a girl working in the bank (S. M. 36) with whom he was fooling around; and that this girl was the appellant was testified to by one of these witnesses (S. M. 33).

Shortly after the aforementioned quarrel and altercation, appellant wrote a letter to Bennett and sent a carbon copy to Mrs. Howe. In this letter she referred to the quarrel and said among other things not pertinent or relevant, "I didn't miss the crack about the F. B. I. Look to me like you are trying to break into prison with you

* The original stenographic copy of the minutes of the trial has been filed with the clerk, and references thereto are indicated by S. M.

bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me" (Exh. 1, S. M. 31).

Appellant explained these statements, oral and written, by testifying that Bennett's wife, mother-in-law and sister-in-law were jealous of her because of her relations with Bennett prior to his marriage. She denied she had stolen any coupons. She gave a different version of her remarks and testified that when accused by them of having written certain letters to Bennett, she denied having done so and that the mother-in-law then rejoined "I think the F. B. I. would be interested to know about you", but didn't make any mention of gasoline coupons. The appellant further admitted having written in her letter to Bennett "I didn't miss that crack about the F. B. I. It looks to me like you are trying to break into prison with your bare hands, etc." As to this, appellant testified that Bennett had shown her a postal card which he stated his wife had received and asked her whether she had written it. She in turn asked him if he had written it since he had told her once of having written a postal card to another girl in order to get rid of her and it looked to her like he was pursuing the same method (S. M. 135-138, 145-147).

With reference to the remark "it will hurt you worse than me", appellant stated that the sister-in-law and mother-in-law had threatened to go to the F. B. I. relative to letters and postal cards received by them (S. M. 146).

The coupons were not received at the bank by appellant when deposited by the bank's clients but it was her duty to check these deposits after receipt from the bank tellers and notify the depositors of any errors. Frequently the deposit slips indicated greater deposits than were actually made (S. M. 125, 126).

Appellant made daily entries in the bank's books of the deposits of ration evidence. The ration coupons were kept in a steel letter file to which admittedly at least four other named persons had equal access and occasion to use for the same purpose, *i.e.*, to deposit and take ration evidence when required by the bank's operations. Later, appellant would make up a recapitulation sheet of the ration evidence deposited, without however, again counting the actual coupons and tokens but solely from the figures on the daily sheets (S. M. 125, 127).

Every two weeks, appellant would take from the steel letter file the accumulated ration coupons and tokens and place them in a cardboard box. At first these would be destroyed at the city incinerator. Later, they were forwarded to the Office of Price Administration in New York City. When doing this she would make up a form supplied by the Office of Price Administration showing the contents of the box. In arriving at the figures on the form, she would not make an actual count of the coupons and tokens but would take these figures from the daily deposit and recapitulation sheets (S. M. 81).

During these two week intervals at least the four other named who were employed by the bank had free access to the contents of the steel letter file containing the ration evidence (S. M. 99).

On or about September 6, 1944, appellant prepared an O. P. A. form as above described and a box for shipment to the Office of Price Administration presumably containing the amounts of coupons of various kinds as indicated therein. She presented both to the bank cashier for his signature as was customary. Instead of signing the form he retained it and the box and caused the contents to be checked against the figures on the form. This disclosed

a shortage of coupons of the value of 37,023½ gallons, the box containing ration evidence of 119,772 gallons whereas the form had on it the figure 156,795½ gallons (S. M. 81, 84, 85).

All the other ration evidence, shoes, meat, processed foods, etc., tallied exactly (S. M. 116, 117).

The foregoing resume is being furnished merely to apprise the Court of some of the facts alleged in the indictment and proof offered by the Government and not because any error is claimed in the admission, receipt or exclusion of evidence during the trial.

The appeal in the Court below was grounded solely upon error in the charge as to the law by the District Court and more particularly upon the questions presented above.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court and holding that the instructions of the Court, to which due exception was taken, were not prejudicial and did not serve to require the petitioner to exculpate herself.

2. In holding that the instructions of the District Court did not nullify the presumption of innocence and "shift the burden of proof" to the petitioner.

3. In holding that the petitioner's attorney did not take proper and adequate steps to point out the error in the said erroneous instructions of the Court on the law and impliedly holding that the exception taken to the said instructions was not sufficient to raise a question on appeal.

4. In holding tacitly and by implication that in view of the evidence connecting the petitioner with the conspiracy, any error in the charge of the District Court was not prejudicial but mere "harmless error". (28 U. S. C. Sec. 391)

ARGUMENT

POINT I

By the said instructions the Court shifted the burden of proof, requiring the petitioner to exculpate herself.

The petitioner took the witness stand in her own behalf. She testified at length to the manner of the banking of ration evidence. She said that the ration coupons were kept in a steel letter file which had a lock; and that the keys to this file were kept in appellant's desk which had no lock. Mr. Travis, the bank cashier, who testified for the Government had a key to the steel file. Three other persons, the note teller, the assistant note teller and a stenographer, had access to and occasion to go to the steel letter file; they would not ask appellant for the key, but would go to her desk and help themselves. Other bank employees may have gone to the steel file and taken ration tokens said Mr. Travis and the appellant testified that if she were not available to furnish either ration information or tokens, another employee of the bank would see to the clients' wants. Mr. Travis testified that appellant's records were accurately kept by her (R. 8).

Under these circumstances with a number of persons having access to the file in which the ration coupons were kept, there was a fair argument and ground for reasonable doubt as to appellant's guilt, which should have been

submitted impartially by the Court to the jury. But the Court, instead, nullified the favorable fact situation and precluded its consideration, by placing the appellant on one side, all other persons on the other side and then asked the rhetorical question, "Who did if she didn't?"

At the close of the testimony on both sides, the jury, beyond listening to the charge of the Court had but one duty to perform, *i.e.*, to determine whether the evidence adduced at the trial was adequate to convince it beyond a reasonable doubt that the petitioner was guilty of the conspiracy charged by the indictment. No other duty devolved on it, save to acquit the petitioner, if it were not so satisfied. The jury was not under a duty to decide who stole the ration coupons if petitioner didn't. Yet they were charged to do so *in haec verba.*

The instruction placed on the jury the duty of finding who the guilty person was assuming that someone was guilty. The proper instruction would have confined them to the only question presented, whether petitioner committed the crime charged. The dissenting opinion (FRANK, *C. J.*), strongly emphasizes this lapse on the part of the trial judge.

After referring to the transcript of the minutes of the trial, FRANK, *C. J.*, said:

> "(c) The transcript also shows the following: As, from time to time, the coupons were deposited in the box, appellant made entries of the deposits. Subsequently, without again examining the contents of the box, appellant, from her previous entries, compiled the written statement which, it turned out, gravely overstated the amount of gasoline represented by the coupons in the box. But, in the interval between the time when she made her first entries and the time

when she prepared the inaccurate statement, not less than four persons other than appellant had had access to the box; among them was Miss Shannon with whom (so appellant testified) Bennett had a far more than casual acquaintance.

2. Thus, disregarding (as we should) that part of the stipulation based upon Bennett's statements, there is no direct evidence of theft by appellant except the testimony of Bennett's wife, mother-in-law and sister-in-law, which might easily have been biased. The only other evidence of her guilt consists of an inference which could reasonably—but need not—be drawn from the gross inaccuracy of the written statement made by appellant of the contents of the box. Accordingly the verdict may well have turned on whether such an inference was made by the jury.

In these circumstances—and remembering that the indictment charged, as an essential part of the conspiracy, that appellant had stolen the coupons—it was of course entirely legitimate for appellant to argue thus to the jury: Since any one of four other persons might have stolen the coupons, there could easily be a reasonable doubt as to appellant's guilt. That issue was obviously crucial.

It was in this context that the judge, in the middle of his instructions, told the jury: "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. *Did she steal them? Who did it if she didn't? You are to decide that.*"

Considering what I have called the 'crucial issue,' it is highly likely that the jurors did not take this remark lightly. They had before them uncontradicted evidence by which, as they knew, appellant was trying to persuade them that, since the coupons might have come into Bennett's possession via any one of four other persons, there was a reasonable doubt as to appellant's guilt. Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. See, *e.g.*, *Boatright* v. *United States*, 105 F. (2d) 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. (2d) 189, 192 (C. C. A. 5); cf. *United States* v. *Wishnatzki*, 77 F. (2d) 357, 360 (C. C. A. 2). The charge would perhaps not have been so interpreted by one with a well trained legal mind; but the Supreme Court has admonished us that the minds of jurors, not being so trained, are usually incapable of subtle discriminations. *Shepard* v. *United States*, 290 U. S. 96, 104. As we have no basis for assuming that the jurors did not accept this charge at its face value, I think we should conclude that it was prejudicially erroneous.

True, the judge also gave the usual general instructions about the burden of proof and presumption of innocence. But, in the face of this specific instruction, the best that can be said is that the jurors may easily have been confused. It has often been held that a verdict should be reversed where, when general instructions are inconsistent with a specific instruc-

tion, the jury may have been confused. See, *e.g.*, *Drossos* v. *United States*, 2 F. (2d) 538, 539 (C. C. A. 8); *Cummings* v. *Pennsylvania R. Co.*, 45 F. (2d) 152 (C. C. A. 2); *Schroble* v. *Lehigh Valley R. Co.*, 62 F. (2d) 993, 996 (C. C. A. 2); cf. *Shepard* v. *United States*, *supra*."

While the Court charged generally on the essential instructions required in criminal cases, it went far beyond what was required and in the particular instructions found at R. 15, fell into serious error, prejudicing the appellant and "shifting the burden of proof" to her.

Bearing in mind, the testimony of the appellant adverted to above, which was stamped as true by the testimony of the witness, Travis, testifying for the Government, the instructions so given had the effect of telling the members of the jury that if by her testimony the appellant had not convinced them that someone else had stolen the ration coupons, then the appellant must have done so. It had the effect of requiring the appellant to convince the members of the jury that she was not, instead of requiring the Government to convince them that she was guilty of the charge in the indictment.

Ward v. *United States* (C. C. A. 5), 96 F. (2d) 189, 192;

Boatright v. *United States* (C. C. A. 8), 105 F. (2d) 737, 740;

Drossos v. *United States* (C. C. A. 8), 2 F. (2d) 538.

The Court by its charge disparaged the claim of appellant that the theft of the ration coupons might well have been committed by the others who admittedly had equal

access to them in the letter file, emphasized her responsibility in the matter and became an advocate for the Government on this very important issue by indicating that the appellant would be motivated to steal them while at the same time, by inference, deprecating the possibility of a like motive on the part of the other bank employees.

Boatright v. *United States*, *supra*.

If there was any confusion engendered in the minds of the jury, it was created by the Court in giving the instruction complained of to which proper, adequate and specific exception was taken.

A charge should not be misleading. (See *Agnew* v. *United States*, 165 U. S. 36, 52, cited in *Bollenbach* v. *United States*, 66 S. Ct. 402.)

It is submitted that in order to establish substantial error it is not required of appellant that she definitely point out with exactitude the prejudice in the Court's instructions.

Little v. *United States* (C. C. A. 10), 73 F. (2d) 861, 866.

POINT II

Counsel for appellant took a proper, specific and adequate exception to the District Court's instruction, in the very words thereof and was not required to pursue the Court for an elucidation thereof.

The majority of the Circuit Court of Appeals took the attitude, unreasonably, it is respectfully submitted, that petitioner's attorney should have persisted in his exception to the Court's erroneous instruction on the law and

insisted that it be corrected. But counsel did except thereto in unmistakable language, in fact, in the very words employed by the Court when giving the instructions. When the Court failed to pay heed to this exception so clearly put [redacted] instead went on to reiterate that the charge in the indictment was that of conspiracy and not of a substantive crime, he again forcibly called the Court's attention to its error when he stated that that was not the point of his exception.

Should he have persisted in requesting the Court to further clarify its instruction? While the majority of the Court below believed that was required of him, the authorities are to the contrary. All that is required is that the exception to the instruction be specific and not merely general, that it direct the attention of the Court to the alleged mistake and thus enable it to correct its error, if any there be.

Hewitt v. *United States* (C. C. A. 8), 110 F. (2d) 119;

Silkworth v. *United States* (C. C. A. 2), 10 F. (2d) 711, 721;

Muench v. *United States* (C. C. A. 8), 92 F. (2d) 332, 336;

Diehl v. *United States* (C. C. A. 8), 98 F. (2d) 545, 547;

Hall v. *Aetna Life Ins. Co.* (C. C. A. 8), 85 F. (2d) 447, 450;

Rules of the Circuit Court of Appeals for the Second Circuit, 9, 10.

To have persisted and reiterated an objection already clearly stated would probably have produced no result except to draw the fire of the Court and to prejudice the

petitioner before the jury. An experienced trial judge like the one presiding could not have failed to understand the point and that is all that can reasonably be required for consideration of the error and resulting prejudice.

As succinctly pointed out by FRANK, C. J., in his dissenting opinion (R. 35, 36), there was absolutely no necessity or requirement on the part of petitioner's attorney to pursue the District Court on this point and insist on an elucidation of the erroneous instruction. He then said:

"When the judge had concluded his instructions, appellant's lawyer excepted as follows: 'I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty."

That was a clear enough statement of the nature of the judge's error; surely clear enough for one whom my colleagues characterize as an "experienced trial judge." It advised him that it was erroneous to tell the jury that, as part of its duty, in order to acquit, it must decide what person stole the coupons if appellant did not. The judge, thus warned, did nothing to correct the error, saying merely, "Yes, I say that was not the crime, but the question is whether these defendants entered into a conspiracy to steal, possess, and transfer these stamps." If that meant anything it meant that appellant was not charged with the substantive crime of theft but with theft as part of a conspiracy, a question not raised by the exception. This comment did not correct the erroneous instruction that unless, from the evidence, the jury found that some other identified person stole the coupons, it must conclude that appellant did.

After the trial judge thus commented, appellant's lawyer said, "That is not the point of my exception." My colleagues suggest that that rejoinder was insufficient, that the lawyer should have made his exception more explicit. I do not agree because, as stated above, I think that the reasons originally given for the exception were adequately clear.

In the light of Rule 51 of the new Rules of Criminal Procedure (assuming this rule also applies to exceptions to instructions of the court on the law) the position of the majority of the Court below is, it is most respectfully submitted, not well taken. Said rule reads as follows:

> RULE 51. EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

And see also subdivision (b) of Rule 52, reading as follows:

> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

POINT III

The erroneous instruction was serious, prejudicial and not mere harmless error.

Although the appeal in the Court below brought up for review only the charge of the Court and only this was printed in the record, the appellate court saw fit to read the transcript of the minutes of the trial. It would seem that after reading this transcript the majority of the Court came to the conclusion that the appellant was undoubtedly guilty of the conspiracy charged by the indictment and *a fortiori*, any error in the Court's instructions to the jury which rendered a verdict of guilty was harmless.

The guilt or innocence of the appellant was not to be passed upon by the Court below on this appeal. That issue was not raised there. What was to be determined was whether the jury had been sufficiently and properly instructed on the law.

As was said in *Miller* v. *United States* (C. C. A. 10), 120 F. (2d) 968, 972:

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

The dissenting opinion in the Court below discloses that the Circuit Court of Appeals for the Second Circuit when it passed on the instant case has adopted a view of the "harmless error" doctrine which is contrary to that expressed in opinions of all the other Circuits and at variance with the pronouncements of the Supreme Court of the United States in *McCandless* v. *United States*, 298 U. S. 342, 347; *Brown* v. *United States*, 308 U. S. 287, 293-294 and *Weiler* v. *United States*, 323 U. S. 606, 611.

Only very recently, this Court had the occasion in *Bollenbach* v. *United States* (66 S. Ct. 402) to pass on this very important point and there said:

"The government argues that the sting of error is extracted because there was proof, other than the erroneous "presumption", on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous "presumption" given them as a guide. A charge should not be misleading (see *Lanier* v. *United States*, 165 U. S. 36, 52). Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding (see Thayer, *Preliminary Treatise on Evidence*, 1898, chaps. 8 and 9; Wigmore, *Evidence*, 3rd ed. 1940, secs. 2490-2540; Morgan, *Some Observations Concerning Presumptions*, 1931, 44 Harv. L. Rev., 906; Denning, *Presumptions and Burdens*, 1945, 61 L. Q. Rev. 379). In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standard appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those

"technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded (40 Stat., 1181, 28 U. S. C., sec. 391). All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency (see Taft, *Administration of Criminal Law*, 1905, 15 Yale L. J., 1, 15). Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless (*Bruno* v. *United States*, 308 U. S. 287, 293-94; *Weiler* v. *United States*, 323 U. S. 606, 611). From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

No otherwise correct abstract charge cannot cure an erroneous instruction of so concrete, vital, determinative and [illegible] nature as in the instant case.

[illegible] from *Bollenbach* v. *United States*, *supra*, this Court, in discussing this point, said:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law (*Quercia* v. *United States*, 289 U. S. 466, 469). 'The influence of the trial judge on the jury is necessarily and properly of great weight' (*Starr* v. *United States*, 153 U. S. 614, 626), and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating charge."

CONCLUSION

The judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 33–46) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 15, 1945 (R. 45–46). The petition for a writ of certiorari was filed December 17, 1945. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court's charge to the jury did, in fact, impose on petitioner the burden of proving her innocence by showing that some other person stole the gasoline ration coupons involved in the conspiracy charged in the indictment.

STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of require-

ments for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person

shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

STATEMENT

Petitioner and George Wesley Bennett were charged in a one-count indictment filed in the United States District Court for the Southern District of New York with conspiring to violate the rationing laws by unlawfully acquiring, possessing, and transferring gasoline ration coupons (R. 4–6). The indictment charged that it was a part of the conspiracy that petitioner would steal gasoline ration coupons from the First National Bank of Poughkeepsie, transfer them to Bennett, and share with Bennett the money obtained from the sale of the coupons. After a jury trial in which the defendants were found guilty (R. 3, 23), petitioner was sentenced to imprisonment for one year and one day (R. 3, 24), and on appeal by petitioner alone to the Circuit Court of Appeals for the Second Circuit, her conviction was affirmed, one judge dissenting (R. 33–46).

No error is claimed "in the admission, receipt or exclusion of evidence during the trial" (Pet. 7), nor does petitioner challenge the sufficiency of the evidence to support the verdict. Proper consideration of petitioner's contention that the trial court committed prejudicial error in instructing the jury, however, requires a statement

of parts of the evidence adduced against her at the trial.[1]

Petitioner was employed at the First National Bank of Poughkeepsie where her duties "were in the main connected with rationing and the necessary bookkeeping attached to the rationing functions which the bank undertook on behalf of the Government" (R. 8). Petitioner would receive from the bank's tellers the ration currency deposited with them by the bank's clients (R. 10); would make daily entries in the bank's books of these deposits (S. M. 125, 127, R. 10), and would place the gasoline ration coupons in a steel letter file, the keys to which were kept in petitioner's unlocked desk. A number of other employees "had access to and the occasion to go to said steel file * * * and they would not ask for the key of Mrs. Bihn, but would go to her desk and help themselves * * *," and "if the ration bookkeeper [petitioner] was not present to furnish information or ration tokens, another employee would take care of the client" (R. 10). Every two weeks petitioner would take from the

[1] The record on appeal contained a "Stipulation of Agreed Facts" (R. 7–11) in the opening paragraph of which it was agreed "that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal." The printed record in this Court contains the same "Stipulation of Agreed Facts" (R. 7–11). The original stenographic copy of the minutes of the trial has also been filed with the clerk, and references thereto are indicated by S. M.

steel file the accumulated gasoline ration coupons and tokens and place them in a cardboard box. At first these were destroyed at the city incinerator. Later they were forwarded to the Office of Price Administration in New York, together with a form showing the contents of the box. In preparing the form, petitioner would not make an actual count of the coupons and tokens but would compile the figures from the daily deposit and recapitulation sheets. (S. M. 81.) Early in September 1944, petitioner prepared a box of ration currency for shipment to the Office of Price Administration, sealed it, and turned it over to the cashier, together with the necessary form, for the cashier's signature, which represented on the face thereof that the box contained, among other things, gasoline rationing currency for 156,795.5 gallons. The cashier did not sign the form but held it, and the box, for examination that night by the bank's auditors. Their examination disclosed that there was gasoline ration currency for only 119,772 gallons in the box, or a shortage of 37,023.5 gallons. (R. 10–11; S. M. 82, 84, 85.)

From August 1943 until February 1944—during petitioner's employment at the bank—defendant Bennett lived with petitioner and her husband in their three-room apartment in Poughkeepsie (R. 7–8). In February 1944 defendant Bennett married, and moved to the home of his mother-

in-law, Mrs. Howe (R. 8). In May 1944, an altercation occurred in front of Bennett's new home. Present were Bennett and his wife, his mother-in-law, his sister-in-law, and the petitioner. Mrs. Howe, after asking petitioner to leave, told petitioner that "if she didn't leave us alone, I would be forced to notify the Federal Bureau of Investigation, that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." To this, petitioner replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too." (R. 9.)[2]

ARGUMENT

Contrary to the view of the dissenting judge (R. 44–45) below and the argument of petitioner here (Pet. 14–15), we think that this case, like the recent case of *United States* v. *Rubenstein* in the Second Circuit, 151 F. 2d 174, certiorari denied November 13, 1945, No. 449, does not involve any issue as to the permissible limits of a federal

[2] There was other evidence, in the form of statements made by Bennett before the grand jury, which was admitted only as against him (S. M. 117–119), to the effect that during the period he lived with petitioner and her husband, petitioner brought home and gave to Bennett on approximately ten occasions an average of 300 to 500 gasoline ration coupons which Bennett sold, dividing the proceeds with petitioner. These statements were admitted as an exhibit and are not reproduced in the stenographer's transcript. They are summarized in the stipulation of agreed facts (R. 8).

appellate court's discretion to disregard error which it considers to have been harmless to the defendant. The majority decision is bottomed squarely upon the view that the portion of the trial judge's instruction complained of—"Did she [petitioner] steal them [ration stamps]? Who did if she didn't? You are to decide that" (R. 18)—did not, in its context, constitute error; that "the language used is not, we think, ambiguous in its setting or reasonably to be understood to mean that the appellant had the burden to prove anything as a condition upon her acquittal" (R. 39). Indeed, the majority expressly conceded that "If the charge is fairly open to such an attack reversible error was committed, for of course the appellant had no burden to prove anything but was presumed to be innocent and was entitled to be acquitted if the evidence as a whole was merely too inconclusive to prove her guilt to the satisfaction of the jury beyond a reasonable doubt" (R. 38).

Thus, in this case, as in *Rubenstein's, supra,* the issue is whether there was error at all, and not whether the court below erroneously extended the harmless error principle.

Petitioner contends (Pet. 8–12), as did the dissenting judge below (R. 42–44), that the trial court "shifted the burden of proof, requiring [her] to exculpate herself" (Pet. 8), when, in commenting on the theft of the ration coupons which were missing from the box examined by the

bank's auditors, the court asked the rhetorical questions quoted above as to who stole the coupons. Petitioner argues that these statements are construable as instructing the jury to "decide who stole the ration coupons if appellant [petitioner] didn't" (Pet. 9), and that they constitute error, as indicated in the dissenting opinion below, by imposing on petitioner "the burden of proving her innocence by proving the identity of some other person as the thief" (Pet. 11; R. 43). But "it is elementary that the instruction as a whole must be considered when error is assigned to a portion thereof,"[3] and we submit that from the charge in its entirety the jury could not have had any impression other than that the defendants were not to be found guilty unless the prosecution had proved to the jury's satisfaction, beyond a reasonable doubt, the existence of a conspiracy as charged and commission of an overt act. Throughout the charge, which comprises about ten pages of the printed record (R. 11–23), the court emphasized that the jury must find from the evidence that the Government had established beyond a reasonable doubt that a conspiracy existed and that an overt act in pursuance thereof had been committed. In the instructions preceding the sentences relied upon as

[3] *Mansfield* v. *United States*, 76 F. 2d 224, 229 (C. C. A. 8), certiorari denied, 296 U. S. 601, citing *Carnahan* v. *United States*, 35 F. 2d 96 (C. C. A. 8); see also *Bandy* v. *United States*, 245 Fed. 98, 100 (C. C. A. 8).

error, the court, after reading the indictment (R. 11–12), correctly instructed the jury concerning the presumption of innocence, reasonable doubt (R. 13) and the elements of conspiracy (R. 14–15), admonishing them that the defendants could not be found guilty unless the prosecution had proved beyond a reasonable doubt that they were "guilty of a corrupt agreement and the performance of an overt act to carry out the agreement" (R. 16). The court then adverted to the theory of the prosecution that pursuant to the conspiracy charged, petitioner was to steal the ration stamps from the bank and give them to Bennett, who would sell them and divide the money with petitioner (R. 17). Following this, the court called the jury's attention to petitioner's denial in her testimony that she was implicated in the theft of the stamps and to her claim that other people in the bank had access to them, at the same time, however, referring to the fact that she had charge of the stamps and that it was her responsibility to prepare an accurate account of them when they were sent in to the O. P. A. (R. 17–18).[4] It was at this point in the charge that the court said (R. 18–19):

---

[4] Petitioner asserts (Pet. 12) that in this latter portion of the instructions the court disparaged her claim that someone else might have committed the theft. However, the court in these comments had called the jury's attention to petitioner's strongest defense, and it was not unfair comment to advert in this connection to her duties in respect of the ration stamps.

> Who would have a motive to steal them? Did she take those stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Following these comments, the court instructed the jury, *inter alia* (R. 20):

> Consider all those phases. You have to decide it. Were these two defendants engaged in a conspiracy to do any of the things charged, to acquire unlawfully these coupons, to possess them unlawfully, to transfer them, to steal them from the bank?
>
> Did they agree and conspire as to that and did they perform an overt act? If so, they would be guilty. You are to say by your verdict.
>
> A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt. If the facts and circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty. If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

It is obvious, we believe, from a reading of the charge in its entirety that the jury could not have been misled or confused by the statements complained of.[5] As this Court said in *Evanston* v. *Gunn*, 99 U. S. 660, 668: "* * *. Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled * * *". All the parts of an instruction "must be considered together and excerpts or particular parts should not be separated and considered apart from the whole." *Graham* v. *United States*, 120 F. 2d 543, 546 (C. C. A. 10). See also *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *United States* v. *Greenbaum*, 123 F. 2d 770, 773 (C. C. A. 2); *Lewis* v. *United States*, 74 F. 2d 173, 177–178 (C. C. A. 9); *Shook et al.* v. *United States*, 10 F. 2d 151 (C. C. A. 5), certiorari denied, 271 U. S. 666. In the light of the full charge and the immediate context of the court's comments on the evidence and the theories of the prosecution and petitioner's defense, we do not think it can be said that the

[5] The failure of petitioner's trial counsel to press his objection, when he saw that the trial judge did not comprehend it, that the instruction in question put upon petitioner the onus of proving who stole the coupons if she did not (R. 21-22), is hardly consistent with petitioner's argument as to the serious effect of the alleged error.

rhetorical questions as to who stole the stamps imposed upon petitioner a burden to prove that someone else stole them in order to exculpate herself. As the majority below said, "The fair import of such language is not that the jury had to determine who in fact stole the coupons if it failed to find that she did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged" (R. 39–40).

CONCLUSION

There was no error in the trial court's charge to the jury and hence no meritorious question or conflict of decisions is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 25–32) and the dissent (R. 32–37) are reported *sub nom. United States* v. *Bennett*, at 152 F. 2d 342.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 15, 1945 (R. 37–38). The petition for a writ of certiorari was filed on December 17, 1945, and was granted on February 11, 1946 (R. 39). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See

also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the jury could reasonably have construed the trial court's charge as imposing on petitioner the burden of proving her innocence by showing that another specific person stole the gasoline ration coupons involved in the conspiracy alleged in the indictment.

STATUTES AND REGULATIONS INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States

will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

* * * * * *

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration

document except in a way and for a purpose permitted by a ration order.

STATEMENT

Petitioner and George Wesley Bennett were charged in a one-count indictment, filed in the United States District Court for the Southern District of New York, with conspiring from July 1, 1943, to September 6, 1944, inclusive, to violate Section 2 (a) of the Act of June 28, 1940, as amended, and the regulations issued pursuant thereto (R. 3–5; *supra*, pp. 2–4). The indictment alleged that it was a part of the conspiracy that the defendants would unlawfully acquire, possess and transfer gasoline ration coupons; that petitioner would steal such coupons from the First National Bank of Poughkeepsie, New York, transfer them to Bennett, and share with Bennett the money obtained from the sale of the coupons. After a trial by jury, petitioner and Bennett were found guilty (R. 19). Petitioner was sentenced to imprisonment for one year and one day (R. 19–20). She alone appealed to the Circuit Court of Appeals for the Second Circuit, and the judgment of conviction was affirmed (R. 25–32, 37–38), one judge dissenting (R. 32–37).

Petitioner does not claim any error "in the admission, receipt or exclusion of evidence during the trial" (Pet. 7), nor does she challenge the

sufficiency of the evidence to support the verdict.[1] Her only contention is that the trial court committed reversible error in instructing the jury. Proper consideration of that contention requires a statement of portions of the evidence adduced at the trial.[2]

On September 5, 1944, the First National Bank of Poughkeepsie, which had undertaken to carry on ration banking functions on behalf of the Government, discovered that while its books showed that for the period August 17, 1944, to August 31, 1944, its customers had deposited gasoline ration coupons representing 156,795.5 gallons of gasoline, it had in its possession coupons representing only 119,772 gallons and that coupons representing 37,023.5 gallons were missing (R. 6, 8–9; S. M. 113–115, Gov. Ex. 6, S. M. 84). Petitioner had been in charge of the ration banking functions of the bank since the early part of September 1943, with the exception of the period January 31, 1944, to March 25, 1944, and the period June 5, 1944, to

[1] The majority opinion of the circuit court of appeals states that the evidence was sufficient to support the verdict (R. 30).

[2] The record on appeal in the court below contained a "Stipulation of Agreed Facts" (R. 5-9), the opening paragraph of which stated "that the facts mentioned hereafter are accurate, but neither party is precluded from referring to additional facts in the record on the argument of the appeal." Both the majority of the circuit court of appeals and the dissenting judge considered the evidence contained in the stenographic minutes of the trial (see R. 30, 32). The original stenographic copy of those minutes has been filed with the Clerk of this Court, and references thereto are designated "S. M."

June 19, 1944 (S. M. 79, 101, 123–124; R. 6). Her duties consisted of keeping custody and control of ration currency which the bank's customers deposited, verifying the deposits, and keeping records thereof (R. 7–8).

Merchant clients of the bank deposited, with the bank, ration coupons which they had received from their customers (R. 8; S. M. 80). These coupons were received by the bank tellers, and petitioner from time to time during the day would take them from the tellers, together with the deposit slips (R. 8, S. M. 79, 91, 124–125). She would then check the coupons against the deposit slips, and, in the event of error, which frequently occurred, she would mail a notice to the depositor (R. 8, S. M. 92–93, 124–125). She made daily entries of these deposits (S. M. 79, 94; R. 8). She placed the gasoline ration coupons in a steel letter file which was kept locked, and other ration coupons in a compartment in the bank's vault (S. M. 98, 125–126; R. 8).

Every two weeks petitioner would take the accumulated ration coupons and place them in a cardboard box. Up to June 14, 1944, the coupons were destroyed at the city incinerator. After June 14, 1944, they were forwarded to the Office of Price Administration, together with a form showing the contents of the box (S. M. 81, 127, 131). In preparing the form, petitioner would not make an actual count of the coupons but would

compile the figures from the daily deposit and recapitulation sheets, the latter of which were prepared from the daily sheets (S. M. 98, 128–129). On September 5, 1944, petitioner prepared a box of ration coupons for shipment to the Office of Price Administration, sealed it, and turned it over to the cashier of the bank, together with the necessary form, for the cashier's signature, the form representing on its face that the box contained, among other ration evidences, gasoline ration coupons for 156,795.5 gallons. The cashier did not sign the form but held it and the box for examination by the bank's auditors. Their examination disclosed that the box contained coupons for only 119,772 gallons, or a shortage of 37,023.5 gallons. There was, however, no discrepancy as to ration coupons for other commodities (R. 8–9; S. M. 82–84, 116).

From August 1943 until February 1944—during petitioner's employment at the bank—her codefendant Bennett lived with petitioner and her husband in their three-room apartment in Poughkeepsie (R. 6). In February 1944, Bennett married and moved to the home of his mother-in-law, Mrs. Howe (R. 6). On Easter Sunday 1944, Bennett left his wife, and upon examining his effects in a dresser in his room, his wife discovered a large quantity of ration coupons, including gasoline ration coupons (S. M. 51–52, 54–58; R. 7). Mrs. Howe was present when this occurred (S. M.

13–14). Bennett had previously told her that petitioner had given him ration coupons (S. M. 17; R. 7). About a week before they were married, Bennett's wife accidentally discovered a number of ration coupons in a compartment in Bennett's automobile (S. M. 53), and Bennett told her at that time that petitioner had given the coupons to him (S. M. 58; cf. R. 7).

In May 1944, an altercation occurred in front of Bennett's new home. The participants were Bennett, his wife, his mother-in-law, his sister-in-law, and petitioner. The mother-in-law testified that after asking petitioner to leave, she told petitioner that "if she didn't leave us alone I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." According to the mother-in-law, petitioner replied: "Go ahead. Your son-in-law is in it just as deep as I am, and if I go to prison he will go too" (S. M. 5–6; R. 7).

Shortly after the quarrel, petitioner sent a letter to Bennett and a carbon copy of the letter to his mother-in-law. The letter referred to the quarrel, and it contained the statement: "I didn't miss the crack about the F. B. I. Looks to me like you are trying to break into prison with your bare hands. Don't worry I can take it. I haven't much more than that now. But I think con-

fining you will hurt you worse than it will me" (R. 7).

A government witness testified that in October and November 1943, he had purchased gasoline ration coupons from Bennett, who indicated to him that he had secured them from "some woman, but he didn't say who she was" (S. M. 46–47). Another government witness testified that in the summer of 1944 he had purchased sugar ration coupons from Bennett (S. M. 41).[3]

Petitioner denied that she had ever taken any ration coupons from the bank, had ever given any coupons to Bennett, or had any agreement to do so (S. M. 132, 140). Through cross-examination of the cashier of the bank and through her own testimony, petitioner showed that the keys to the file in which the gasoline ration coupons were stored were kept in a drawer in her desk, which had no lock; that the cashier had a key to this file; that the note teller, assistant note teller, and a stenographer "had access to and the occasion to

[3] There was other evidence, in the form of statements made by Bennett before the grand jury, which was admitted only as against Bennett (S. M. 117–119), to the effect that during the period he lived with petitioner and her husband, petitioner brought home and gave to Bennett, on approximately ten occasions, an average of 300 to 500 gasoline ration coupons which Bennett sold, dividing the proceeds with petitioner. These statements were admitted as an exhibit (Gov. Ex. 9, S. M. 119). They are summarized in the stipulation of agreed facts (R. 6).

go to said steel file * * * and they would not ask for the key of [petitioner], but would go to her desk and help themselves * * *," and "if the ration bookkeeper [petitioner] was not present to furnish information or ration tokens, another employee would take care of the client" (R. 8; S. M. 99–100, 109, 126–127, 130). In addition, petitioner testified that Ann Shannon, who was in charge of the ration banking during the period January 31, 1944, to March 25, 1944 (S. M. 105, 124), was Bennett's "girl friend" (S. M. 143).

During the course of his charge to the jury, the trial judge said (R. 15):

> Her [petitioner's] claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, or

> the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Petitioner's counsel excepted to the charge "that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty." To this, the judge responded: "Yes, I say that was not the crime but the question is whether these defendants entered into a conspiracy to steal, possess and transfer these stamps." (R. 17.) Counsel, after stating that "That is not the point of my exception" (R. 17), went on to take up other complaints he had in respect of the charge.

The majority of the court below conceded that if the quoted portion of the charge could be fairly construed as an instruction to the jury that it must decide not only that petitioner did not steal the coupons, but who did steal them, before it could acquit her, reversible error was committed because the burden was placed upon her to prove her innocence by showing the identity of the thief or thieves (R. 30). However, the majority concluded that reversible error had not been committed because the fair import of the language was "not that the jury had to determine who in

fact stole the coupons if it failed to find that [petitioner] did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged" (R. 31–32). The dissenting judge thought that there was no basis for assuming that the jurors did not accept at its face value the judge's statement that they were to decide who stole the coupons if petitioner did not (R. 35).

SUMMARY OF ARGUMENT

The sole question presented by this case is whether the jury could reasonably have understood the judge's charge as requiring petitioner to show, in order to be acquitted, that one of the other persons who had access to the gasoline ration coupons involved in the conspiracy charged stole them. If the jury could reasonably have so interpreted the charge, the Government concedes that reversible error was committed, since the burden of proving her innocence was placed upon petitioner. The Government takes the position that the charge was not fairly susceptible of that construction, and, therefore, that the recent decision of this court in *Bollenbach* v. *United States,* decided January 28, 1946, No. 41, this Term, is not applicable.

The error assigned is predicated on a few words appearing in a charge covering approximately ten

pages of the printed record. Whether those words are read in isolation or in connection with the charge as a whole, as they should be, there is no reasonable basis for claiming that the jury could have been misled into believing that the burden of proof was on petitioner in the respect asserted by her. On seven occasions during the charge, the judge told the jury that the Government was required to establish petitioner's guilt beyond a reasonable doubt; four of these occasions occurred subsequent to his utterance of the allegedly erroneous instruction. On such a record, it is unreasonable to conclude that the jury may have thought that petitioner could establish her innocence of the conspiracy charge only by proving who actually stole the ration coupons.

When the language in question is placed in its proper setting, it becomes additionally evident that the trial judge was not instructing the jury that the burden of proving her innocence was on petitioner, but was only commenting, as he had a right to do, on the evidence in the case as it applied to the issues involved. Whether petitioner had stolen the gasoline ration coupons involved in the conspiracy charged or whether one of the other persons who had access to them might have stolen them were relevant questions, the answers to which would materially aid in deciding whether petitioner was guilty of conspiring as charged. In the judge's rhetorical questions to the jury, "Did

she steal them? Who did if she didn't," and in the words, "You are to decide that," the judge was only telling the jury, as he was required to do, that they were free to determine whether someone else might have been the culprit. It would appear to be a gross distortion to say that the judge was thereby instructing the jury that petitioner was required to prove that one of the other bank employees who had access to the stamps was the thief, or that the jury could have so understood the judge.

ARGUMENT

The only question in this case is whether the portion of the trial judge's charge to the jury quoted *supra*, pp. 10–11, particularly the words, "Did she [petitioner] steal them [the gasoline ration coupons]? Who did if she didn't? You are to decide that," could reasonably have been understood by the jury as requiring petitioner to show, in order to be acquitted, that one of the other persons who had access to the coupons (see *supra*, pp. 9–10), stole the coupons. If the jury could reasonably have so interpreted the charge, the Government concedes that reversible error was committed, since the burden of proving her innocence would thus have been placed upon petitioner. Cf. *Coffin* v. *United States*, 156 U. S. 432, 461; *Boatright* v. *United States*, 105 F. 2d 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. 2d 189, 192 (C. C. A. 5). The Govern-

ment's position is that the charge was not fairly susceptible of being understood by the jury as requiring petitioner to prove, in order that they might acquit her, that one of those persons who had access to the coupons stole them.

THE JURY COULD NOT REASONABLY HAVE UNDERSTOOD THE JUDGE'S CHARGE AS REQUIRING PETITIONER TO PROVE, IN ORDER THAT SHE MIGHT BE ACQUITTED, THAT ONE OF THE OTHER PERSONS WHO HAD ACCESS TO THE GASOLINE RATION COUPONS STOLE THE COUPONS

Petitioner contends (Br. 9–14), as did the dissenting judge below (R. 34–36), that the trial judge shifted the burden of proof, requiring her to exculpate herself, when, in commenting on the theft of the ration coupons, the judge asked the rhetorical questions quoted above as to who stole the coupons. She argues that these questions are fairly construable as instructing the jury to decide who the thief was, if she was not, thus imposing on her, as indicated in the dissenting opinion below, "the burden of * * * proving the identity of some other person as the thief." (R. 35.) The majority of the court below took the view, and we submit correctly so, that "the language used is not, * * * ambiguous in its setting or reasonably to be understood to mean that the [petitioner] had the burden to prove anything as a condition upon her acquittal. * * * The fair import of such language is not that the jury had to determine who in fact stole the coupons

if it failed to find that she did but to decide whether she or someone else stole them and to consider that in determining whether she intentionally participated in a conspiracy as charged." (R. 31–32.)[4]

In *Bollenbach* v. *United States,* decided by this Court on January 28, 1946, No. 41, this Term, slip sheet, p. 5, the Court said that "A conviction ought not to rest on an equivocal direction to the jury on a basic issue," and, referring to the unanimous opinion of the circuit court of appeals in that case that the charge to the jury was wrong, the Court said: "And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal." We do not have that situation here. Not even the dissenting judge in the court below thought that the charge, properly understood, was erroneous.[5] The only basis for his dissent was that the jury might have been misled. As to this, the other two judges reached an oppo-

[4] Contrary to the view of the dissenting judge (R. 36–37) and the argument of petitioner here (Br. 18–21), we do not think that the case involves any issue as to the permissible limits of a federal appellate court's discretion to disregard error which it considers to have been harmless to the defendant. As indicated above, the majority decision is bottomed squarely upon the view that the portion of the instruction complained of did not in its context constitute error.

[5] Judge Frank said: "The charge would perhaps not have been so interpreted [to place the burden of proving her innocence on the petitioner] by one with a well trained legal mind." (R. 35.)

site conclusion, and there is nothing in the *Bollenbach* case to suggest that a division of opinion among the appellate judges as to the possibility of the jury's having misunderstood the charge is conclusive evidence that the charge must have confused and misled the jury. If this were the rule, convictions would have to be reversed on the basis of the view of a minority of the reviewing court. The question in this case cannot be answered by resort to such a mechanical test—a device through which the appellate court, essentially, abdicates its duty of making a reasoned judgment.

The task of the appellate court in a case of this sort is to determine what the jury's understanding was. Of course, no one can say, to a mathematical certainty, that the jury was not misled. Doubts as to a jury's understanding of a charge are inevitable in any case.* Convictions should be reversed, however, only if the appellate court can find that the jury could reasonably have misunderstood the judge's charge.

The portion of the charge under attack did not even literally place upon petitioner the burden of proving the guilt of another as a necessary condition upon her acquittal. Moreover, defendants in criminal cases often have sought to upset their convictions by plucking from the charge to the jury some portion which, considered by itself,

* "In most English words and phrases there lurk uncertainties." *Robinson* v. *United States*, 324 U. S. 282, 286.

suggests that the jury was furnished an erroneous standard for judging guilt. But in cases of that kind, this Court and the circuit courts of appeals have said that the challenged portion of the charge is not to be read in isolation, but with the charge as a whole, with what preceded and with what followed, and, if in that aspect, there is no reasonable basis for claiming that the jury was charged incorrectly, the attack must fail. See *Boyd* v. *United States*, 271 U. S. 104, 107; *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; *Hargreaves* v. *United States*, 75 F. 2d 68, 73 (C. C. A. 9), certiorari denied, 295 U. S. 759; *Caldwell* v. *United States*, 36 F. 2d 742, 744 (C. C. A. 10), certiorari denied, 281 U. S. 725; *Wallenstein* v. *United States*, 25 F. 2d 708, 712 (C. C. A. 3), certiorari denied, 278 U. S. 608; cf. *Evanston* v. *Gunn*, 99 U. S. 660, 668.[7] We submit that, when the charge is read as a whole, it becomes abundantly clear that the jury could not fairly have construed the language under consideration as requiring petitioner to prove as a condition to her exculpation that one of the other persons who had access to the gasoline coupons stole them.

The charge comprises about ten pages of the printed record (R. 9–19). Throughout the

[7] It may be noted that in the *Wallenstein* case, one of the circuit judges dissented because he thought that the jury must have been misled by the instruction to consider an issue not properly in the case.

charge, the trial judge emphasized that the jury must find from the evidence that the Government had established beyond a reasonable doubt that a conspiracy as alleged in the indictment existed and that an overt act in pursuance of the conspiracy had been committed. We here set out the trial judge's instructions in this respect:

> 1. [R. 10] The defendants in this case as in all criminal cases are presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence stays with the defendants from the beginning to the end of the trial and until you are satisfied beyond a reasonable doubt of guilt.
>
> 2. [R. 13] Having satisfied yourselves beyond a reasonable doubt that the Government has shown the agreement, it makes no difference what overt act was done, as long as you find beyond a reasonable doubt that an overt act was done to carry out the agreement.
>
> 3. [R. 13] Has the Government proved and satisfied you beyond a reasonable doubt that these two defendants are guilty of a corrupt agreement and the performance of an overt act to carry out the agreement? If that has been proven, then the defendants are guilty. Otherwise they are not.
>
> 4. [R. 16] A defendant is not required to establish his innocence but the Government must establish guilt beyond a reasonable doubt.

5. [R. 16] If the Government has established guilt beyond a reasonable doubt, you will find these defendants guilty.

6. [R. 18] Of course the Government must establish the question of guilt beyond a reasonable doubt.

7. [R. 18] Mr. SAYPOL [counsel for petitioner's codefendant]. Once they [the jury] have a reasonable doubt they must stop.

The COURT. Of course.

The jury was thus instructed seven times that petitioner could not be found guilty unless they found that her guilt was established beyond a reasonable doubt. They were so told four times after the trial judge uttered the few words which petitioner asserts cast upon her the burden of establishing her innocence. On this record, we suggest that it is unreasonable to believe that the jury could have so understood those few words.

Furthermore, when the language under consideration is placed in its proper setting, it seems evident to us, and we believe that it was equally evident to the jury, that the judge was not telling them that petitioner was under a duty to establish to their satisfaction the identity of the thief or thieves, but was merely explaining and commenting, as he was entitled to do, on the evidence in the case. It is well settled that a federal judge may "assist the jury in arriving at a just con-

clusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia* v. *United States,* 289 U. S. 466, 469; see also, *United States* v. *Murdock,* 290 U. S. 389, 394.

The judge had a short time earlier adverted to the theory of the prosecution that pursuant to the conspiracy charged, petitioner was to steal the ration coupons from the bank and give them to her codefendant, who would sell them and divide the proceeds with petitioner (R. 14). He then proceeded to explain and to comment on the evidence in the case. First, he called the jury's attention to petitioner's denial in her testimony that she was implicated in the conspiracy, stating, "I am referring to the testimony, not for the purpose of emphasis, but to aid you in arriving at a verdict." Then he described petitioner's duties in respect of the ration coupons, and how the shortage had been discovered (R. 14). He next referred to petitioner's claim that other employees of the bank had access to the coupons, at the same time, however, referring to the fact that petitioner was in charge of keeping the coupons and that it was her responsibility to prepare an accurate account of them when they

were sent to the Office of Price Administration (R. 15).* It was at this point in the charge that the judge said (R. 15):

> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that. Did she turn them over to Bennett to dispose of them? You have heard the testimony of the witnesses for the Government and of the witnesses for the defendant.

Immediately following these statements, the judge said (R. 15):

> Mrs. Howe, the mother, you heard her testimony; how did that impress you? Did she impress you as somebody who would take the witness stand and deliberately commit perjury? And her daughters.

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*Petitioner asserts (Br. 13–14) that in this latter portion of the instructions the judge disparaged her claim that someone else might have committed the theft. However, the judge in these comments had called the jury's attention to petitioner's strongest defense, and it was not unfair comment, we submit, to advert in this connection to petitioner's duties in respect of the ration coupons. In this very connection, moreover, the trial judge told the jury that "I understood [petitioner] to so testify. It is the jury's recollection of the facts that will control. If your recollection doesn't agree with mine you are to disregard my recollection." (R. 17.)

> You have also heard the testimony of Bennett where he testified before the Grand Jury and spoke of his participation in the disposition of the stamps.
>
> You have heard the testimony of the witnesses about having received stamps from him. Well, you are to decide it. Please do not lay aside your common sense when you decide it. Apply it.

The judge then turned from the evidence in the case to general rules by which the jury was to be guided in arriving at a verdict.

On the evidence, a plainly relevant question for the jury was whether petitioner had stolen the stamps or whether one of the other persons who had access to them might have stolen them. The answer to this question might well go far in the direction of a conclusion on the basic issue in the case—whether petitioner had conspired to unlawfully possess and transfer gasoline ration coupons. Before stating the rhetorical questions, "Did she steal them? Who did if she didn't?", the judge did not instruct the jury that it must answer these questions; he simply said that "you have a right to consider that" (R. 15). He was, we think, only calling the attention of the jury to the materiality of these questions, and with the words, "You are to decide that," he was telling the jury, as he was required to do, that it was *for them* to determine whether someone else might have stolen the coupons. To us, it seems a gross

distortion to say that the judge was instructing the jury that the burden was on petitioner to establish her innocence by proving that one of the other bank employees who had access to the stamps was the culprit, or that the jury could have so understood the judge.

A criminal appeal should not be turned into a quest for error. See *Johnson* v. *United States*, 318 U. S. 189, 202. The record should not be hunted over less to discover real error or injustice than to pick a flaw on which to hang an objection. *Commonwealth* v. *Karamarkovic*, 218 Pa. 405, 406.

CONCLUSION

Petitioner was found guilty by a jury who were instructed correctly. We respectfully submit, therefore, that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1945.

Verna Mae Bihn, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner and one Bennett were convicted of a conspiracy[1] to violate the statute and regulations governing the rationing of gasoline.[2] It was charged that between July 1, 1943 and September 6, 1944 petitioner would steal gasoline ration coupons from the First National Bank of Poughkeepsie, New York, where she was employed, transfer them to Bennett, and share with Bennett the proceeds of the sales. The case was tried to a jury. Petitioner alone appealed to the Circuit Court of Appeals, which sustained the judgment of conviction, one judge dissenting. 152 F. 2d 342. The sole question presented below and here is whether a portion of the charge constituted reversible error. We granted the petition for a writ of certiorari because the charge given raised an important question in the administration of the federal criminal laws.

The crucial issue, so far as petitioner's case was concerned, was whether she stole the ration coupons from the bank.

Bennett did not take the stand. Statements made by him out of court were introduced. They implicated petitioner in the scheme. But they were admissible against Bennett alone, not against petitioner. And the trial judge so ruled. Two of Bennett's relatives—his mother-in-law and sister-in-law—testified concerning conversations they had had with petitioner. Their versions of the conversations implicated petitioner in the scheme. Petitioner's version was different. The conflict in testimony presented a question of credibility for the jury. Bearing on that was the

[1] Criminal Code § 37, 18 U. S. C. § 88.

[2] Sec. 2 (a) of the Act of June 28, 1940, as amended, 54 Stat. 676, 55 Stat. 236, 56 Stat. 177, 50 U. S. C. App. Supp. IV, § 633; § 2.6 of General Ration Order No. 8, as amended, 8 Fed. Reg. 9626, 9 Fed. Reg. 1327, 2746.

possible bias of those witnesses, traceable in part to their hostility to petitioner on account of the fact that she apparently had been on intimate terms with Bennett prior to his marriage.

There was no direct evidence that petitioner had stolen the coupons. There was, however, other evidence from which such an inference could be drawn. It assumed a place of considerable importance at the trial. And the alleged error in the charge relates to it.

Petitioner handled ration coupons which merchants deposited with the bank. The ration coupons were received by tellers for deposit. After the coupons had been received for deposit by the tellers, petitioner checked the deposits against the deposit slips and kept the rationing records. After counting the coupons and making the entries, she placed the coupons in a steel file which was locked. The keys to the file were kept in her desk which was also locked. At regular intervals petitioner would take the accumulated ration coupons and box them for transmission to the Office of Price Administration. She would also prepare a form showing the contents of the box. In preparing this form, she would not recount the coupons but would compile the figures from the daily records which had been prepared as the coupons were deposited. On September 5, 1944, petitioner prepared a box for transmission to the Office of Price Administration, sealed it, and turned it over to the cashier of the bank. The accompanying form represented on its face that the box contained gasoline ration coupons for some 156,000 gallons. Its examination showed a shortage of some 37,000 gallons. Petitioner had a good record at the bank. The accounts which she kept were kept well and accurately. She was not the only one who had access to the coupons in the steel file. At least four other employees of the bank had equal access to that file. One of these was a lady with whom, according to petitioner's testimony, Bennett had a rather intimate acquaintance.

The case against petitioner was therefore a close one. Plainly there was sufficient evidence for submission of the case to the jury. But since one of four other persons might have purloined the coupons, reasonable doubt as to petitioner's guilt might readily be inferred.

It was against this background that the trial judge charged the jury:

"Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. *Did she steal them. Who did if she didn't? You are to decide that.*" (Italics added)

Counsel excepted to the charge on the ground that it was not "the jury's duty to find out who did steal the stamps." No modification of the charge was made.

We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard* v. *United States*, 290 U. S. 96, 104), that we conclude that the charge was prejudicially erroneous.

Instructions to acquit, if there was reasonable doubt as to petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt. As stated by Judge Frank in his dissenting opinion below: "Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief." 152 F. 2d, p. 348. Or to put the matter another way, the instruction may be read as telling the jurors that if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so. So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials

[a] "On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The Federal Rules of Criminal Procedure, effective March 21, 1946, provide that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 (a). This is merely a restatement of existing law and effects no change in the "harmless error" rule.

of those accused of crime. See *Quercia* v. *United States*, 289 U. S. 466, 469.

The "harmless error" statute[3] (Judicial Code § 269, 28 U. S. C. § 391) means that a criminal appeal should not be turned into a quest for error. It does not mean that portions of the charge are to be read in isolation to the full charge and magnified out of all proportion to their likely importance at the trial. *Bo* v. *United States*, 271 U. S. 104, 107. Yet as stated in *McC* v. *United States*, 298 U. S. 342, 347-348, "an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." It seems plain that the inflection or tone of voice used in giving the challenged instruction could make it highly damaging. And in any event the probable lines of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we cannot say that prejudicial error was committed. We certainly cannot say from a review of the whole record that lack of prejudice affirmatively appears. While there was sufficient evidence for the jury the case against petitioner was not open and shut. Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Rottenbach* v. *United States*, 327 U. S. —.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 675.—October Term, 1945.

Verna Mae Bihn, Petitioner, vs. The United States of America. On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 10, 1946.]

Mr. Justice Black, dissenting.

The jury found this defendant guilty beyond a reasonable doubt after the trial judge had charged that "A defendant is not required to establish his innocence but the [illegible] must establish guilt beyond a reasonable doubt. [illegible] is also clear that if the circumstances surrounding the case are as consistent with innocence as with guilt, he is not guilty." Six other times the judge explicitly charged the jury to the same effect. The defendant's innocence is presumed; she need not prove it; the burden is on the Government to prove her guilt beyond a reasonable doubt. Yet the Court now reverses on the ground that the jury might conceivably have taken three sentences in the trial judge's charge to mean that the defendant must prove innocence, which conceivably might have led the jury to believe that the court might have instructed to withdraw his seven explicit instructions to the contrary. The three sentences were: "Did she steal them? Who did if she did not? You are to decide that." Instructions such as these as to who stole the coupons were necessary because of the petitioner's defense that somebody else had taken them. The trial judge was obviously telling the jury not to ignore the petitioner's defense. No reference was made to burden of proof and no ordinary juror, unskilled in legal dialectics, would have suspected the latent ambiguity which the Court has discovered. Of course, hypercritical scrutiny of each word and sentence in every charge when considered alone would always reveal dual meanings. The sentences here in question, like the sentences in every charge, should be given a common sense interpretation in their relationship to all instructions and the issues raised. When so considered, it is impossible for me to believe that the jury was confused as to burden of proof. Seven correct explicit instructions should not be considered neutralized by legalistic inferences established by purely formal analysis.

Mr. Justice Reed and Mr. Justice Burton join in this dissent.